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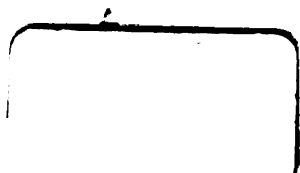
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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA.

DECEMBER 9, 1896—JANUARY 27, 1897.

BY
BENJ. I. SALINGER.

VOLUME XI,
BEING VOLUME C OF THE SERIES.

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Sixteenth District—S. M. ELWOOD, Sac City; Z. A. CHURCH, Jeffer-
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Seventeenth District—GEORGE W. BURNHAM, Vinton; OBED CASWELL,
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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF
THE STATE OF IOWA

AT
DES MOINES, OCTOBER TERM, A. D. 1896,

AND IN THE FIFTY-FIRST YEAR OF THE STATE.

STATE OF IOWA, v. GEORGE S. SMITH, Appellant.*

Principal and Accessory: CONSTRUCTION OF STATUTE. Under Code, section 4814, which abrogates the distinction between an accessory
1 before the fact and a principal, making both principals, it is error to charge, no conspiracy being involved, that a defendant who did not actually commit the act constituting the crime, which was committed by another, is guilty, if at all, of whatever offense the evidence shows such other to have committed. This statute simply changes the crime to a substantive one, and makes it so far independent that one who would have been an accessory at common law, may be dealt with as a principal, without reference to the prosecution of him who would, at common law, have been the principal.

Defense of Dwelling House: "DWELLING HOUSE" DEFINED. The fact
8 that a man sleeps and keeps his clothes in the back part of a room used as a store, under an agreement with the tenant, does not

*The figures on the left of the syllabi refer to corresponding figures placed on the margin of the case at the place where the point of the syllabus is decided.

100	1
101	370
100	1
104	336
100	1
106	703
100	1
112	462
100	1
118	504
118	506
118	681
100	1
128	722

justify him in defending the building against intruders, as his dwelling house or private habitation.

Self Defense: APPREHENDED DANGER, An instruction which makes the right of self defense depend upon the actual necessity to protect one's self, and not upon the existence of reasonable ground for believing that it is necessary, is erroneous.

Appeal from Johnson District Court.—HON. M. J. WADE,
Judge.

WEDNESDAY, DECEMBER 9, 1896.

THE defendant was accused of the crime of assault with the intent to commit murder, tried by jury, found guilty, and adjudged to be imprisoned in the state penitentiary at Anamosa, at hard labor, for the term of one year and eight months. From that judgment, he appeals.—*Reversed.*

Bailey & Murphy, Joe A. Edwards, and Hedges & Bumble for appellant.

Milton Remley, attorney general, for the state.

ROBINSON, J.—On the thirteenth day of August, 1895, R. P. Jones, the sheriff of Johnson county, had for service an order, issued by a justice of the peace, for the removal of the defendant, "and store goods and office furniture," from a certain building in a village of Johnson county. He found the premises described in the order occupied by the defendant and his brother, John T. Smith, with a small stock of medicines and some groceries. When the sheriff made known his

while attempting to enter the building after the defendant had left it, John T. Smith discharged at him a gun. The shot with which the gun was loaded missed the sheriff, but hit four children, who were on the opposite side of the street. It is claimed that defendant was accessory to the act.

I. The court gave to the jury an instruction as follows: "(5) It is the law of this state that all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, even though not present, are equally guilty with the principal, and are subject to the same punishment, and guilty of the same offense, as the person who actually does the act which constitutes such offense; and in this case, the defendant, if guilty at all, under the evidence, is guilty only as aiding or abetting the said John T. Smith in the commission of the crime charged in the indictment, or some of those included therein."

1 Also: "(13) * * * The defendant, if guilty at all, is guilty of whatever offense was committed by the said John T. Smith, if any; and if he is not guilty of such offense, if any, as was under the evidence committed by John T. Smith, then he cannot be found guilty of any offense under this indictment, and he must be acquitted." These instructions, although in different paragraphs of the charge, are properly considered together. It is our opinion, that they announce an erroneous rule of law. Section 4314 of the Code is as follows: "The distinction between an accessory before the fact and a principal, is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, though not present, must hereafter be indicted, tried, and punished as principals." The effect of this provision is to make the offense of one who, at

common law, would have been an accessory before the fact, substantive, and so far independent that he may be indicted, tried, and punished, and as a principal, without regard to the prosecution of the person who, at common law, would have been the principal. The guilt of a person who aids or abets the commission of a crime must be determined upon the facts which show the part he had in it, and does not depend upon the degree of another's guilt. See *State v. Lee*, 91 Iowa, 499 (60 N. W. Rep. 119); *People v. Kief*, 126 N. Y. 661 (27 N. E. Rep. 557); *Goins v. State* (Ohio) (21 N. E. Rep. 478); *State v. Steeves* (Or.) (43 Pac. Rep. 954); *State v. Bogue* (Kan. Sup.) (34 Pac. Rep. 410); *State v. Patterson*, 34 Pac. Rep. 784; 1 Am. & Eng. Enc. Law (2d Ed.) 269; 1 Wharton, Cr. Law, section 237. In this case, the shot which endangered the sheriff was fired by John T. Smith. He may have fired it with such premeditation and malice, as to have committed the offense of an assault with intent to commit murder; yet the defendant may have abetted or counseled it in the heat of passion, without premeditation, and without malice, and thus have been guilty of the offense of assault with intent to commit manslaughter. *State v. White*, 45 Iowa, 325. It is clear that, had these been the facts, the defendant would not have been guilty of the offense committed by his brother. It should be remembered that the instructions we have set out have no reference to an act committed as the result of a conspiracy. In such a case a different rule prevails, for the reason that a conspirator engaged in an unlawful act is liable for the acts of his co-conspirators, done in pursuance of the common design. *State v. Munchrath*, 78 Iowa, 268 (43 N. W. Rep. 211). The evidence with regard to the connection of the defendant with the offense alleged to have been committed by his brother is

conflicting, and we cannot say that the error pointed out was without prejudice.

II. The district court also charged the jury as follows: "(15) It is contended by the defendants that whatever acts the said John T. Smith did were in self-defense of himself and his property. As to

2 this, you are instructed that the said R. P.

Jones was rightfully upon said premises, and had a right to enter the building occupied by John T. Smith; and the said John T. Smith would have a right under the law to use a deadly weapon in defense of his property (and a loaded shot gun is a deadly weapon), or in self-defense, only in case such use of said deadly weapon was reasonably necessary to protect his life, or to protect his person from serious bodily harm." "(16) In other words, before a person is authorized, under the law, to make an assault with a deadly weapon, he must, as a reasonable person, have reasonable apprehension of danger to his life or serious injury to his person; and such apprehension must be reasonable, or appear to him to be reasonable, under all the circumstances as presented to him at the time, and the use of such deadly weapon must have appeared to be reasonably necessary. Therefore, gentlemen, you will have to determine whether or not the shooting by the said John T. Smith was reasonably necessary, under all the circumstances, to protect his person from serious bodily injury, or to protect his life; that is, whether he, as a reasonable man, under the circumstances, apprehended danger to his life, or serious bodily harm, and whether he used the gun in defense thereof, and whether said use of said gun was reasonable. If so, he was not guilty of any offense, and the defendant herein should be acquitted." The appellant justly complains of the fifteenth paragraph, because it made the right of John T. Smith to use a deadly weapon in

defense of himself or property depend upon the actual necessity for such use, and not upon his having reasonable ground for believing that it was necessary. *State v. Shelton*, 64 Iowa, 338 (20 N. W. Rep. 459). It is claimed that the error pointed out was cured by the sixteenth paragraph of the charge, but, as the judgment of the district court must be reversed on a ground already stated, it is only necessary to say that the error should be avoided on another trial. The first part of paragraph 15 is also criticised, but, as it is made to depend upon a state of facts which may not exist on another trial, we refrain from discussing the alleged error.

III. The court refused to give to the jury an instruction asked by the defendant, in words as follows: "You are instructed to determine as to whether or not that was the dwelling house or habitation of John T. Smith, and if you find that it was his dwelling house or habitation, you are then instructed that he did not, under the law, have to retreat from it, but could defend himself, and resist intrusion, by any means, if he, as a reasonable man, had an apprehension that the party making the attempt to enter was intending to commit great bodily harm, and that his entering was for the purpose of committing said bodily harm." It is urged by the defendant that the evidence authorized the jury to find that the room in which John T. Smith carried on his business was his living apartment, in which he resided. It appears that the defendant and his brother occupied the front part of a room twelve by twenty-four feet in size for business purposes. It was separated from the back part by a partition, which extended but a part of the way across the room, and did not reach the ceiling. John T. Smith had occupied the room with the defend

some clothing in the back part. His occupation was by virtue of some arrangement with the defendant, who claimed that he had leased the premises, and he obtained his meals outside the building. We find nothing in the record which would have justified the giving of the instruction refused. The evidence did not show that the place was a dwelling house or private habitation, but a public place of business, to which the people of the community were expected to resort. The fact that John T. Smith slept and kept a few articles of clothing there did not change its character. In view of the conclusion reached, we find it unnecessary to consider the other questions discussed. For the reasons shown, the judgment of the district court is REVERSED.

STATE OF IOWA V. JOE ALLEN, Appellant.

Misconduct of Counsel: OPENING STATEMENT. It is not reversible error for the attorney for the prosecution, in good faith, and with
 1 reasonable grounds to believe certain evidence admissible, to state to the jury, in his opening statement, the substance of such evidence, though, when offered, it is rejected.

MISCONDUCT OF COURT: *Examining witness.* The asking of ques-
 2 tions of witnesses, in a criminal trial, by the court, in such manner and under such circumstances as to indicate to the jury the court's suspicion or opinion that the witness had been instructed by defendant or his attorney not to answer a certain question which the court required him to answer, is cause for reversal, where there was no foundation for such suspicion or opinion.

Notice of Evidence: PROOF OF SERVICE. Proof that a notice advising
 5 of proposed additional witnesses in a criminal trial has been served, must be made either by formal return like that required on an original notice, or, else, by other evidence showing that the notice was in fact given to the defendant, as the statute requires.

Cross-examination. A sheriff who has testified upon direct examination in a criminal action, that after receiving the warrant for
 8 defendant he made search for him, may be asked on cross-examination, if the defendant's father had not stated to him the day before the warrant was served, that he would have the defendant come up the next morning and surrender himself, as such fact

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110	638
100	7
122	85
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would tend to affect the credibility of his statement that he could not find defendant, by showing that, under the circumstances, he was not likely to make such a search; and it would bear, as well, on the claim made that defendant was evading arrest.

SAME. A witness who has testified to the bad moral character of
4 another witness, cannot be questioned on cross-examination as to whether he had ever heard certain persons named, not shown to have been acquainted with or to live in the neighborhood of the witness to whose character he had testified, speak of the latter's character.

Appeal from Dickinson District Court.—HON. W. B. QUARTON, Judge.

WEDNESDAY, DECEMBER 9, 1896.

THE defendant was indicted for the crime of seduction, was convicted, and sentenced to the penitentiary for the term of two years, and adjudged to pay the costs of prosecution, from which sentence and judgment this appeal is prosecuted.—*Reversed.*

Allen & Cullen and A. C. Parker for appellant.

Milton Remley, attorney general, for the state.

KINNE, J.—I. We are confronted with a record of over four hundred pages, in which not a single assignment of errors is to be found. Under the statute, in such cases we are required to "examine the record, and, without regard to technical errors, or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands." Code, section 4538. We have held in criminal cases, where no argument or assignment of errors was filed, that we would not enter upon a discussion of the case; that in such cases all we were required to do was to examine the record, and, if no error was found, to announce that fact and the judgment of the court. *State v. Quinn*, 63 Iowa, 396 (19 N. W.

Rep. 256); *State v. Lundermilk*, 50 Iowa, 695. In this case, however, extended arguments are filed by both sides, and we shall proceed to discuss the questions presented. The county attorney, in his opening statement to the jury, said he proposed to show that the defendant stated to the prosecutrix that if she would release him from all liability he would pay her a certain sum of money; that he endeavored to get her to dispose of the child in some way so as to relieve him from liability, and offered her money to do so. The statement was objected to before being made, as well as afterwards, as being incompetent, irrelevant, and immaterial, and the objection was overruled, and an exception taken. It is earnestly contended, that such evidence was not only improper and inadmissible, but was known to be so by the county attorney when he made the statement, and hence was without warrant, and made in bad faith, and such misconduct as worked great prejudice to the defendant. We do not find it necessary to determine the question of the admissibility of such evidence. If, however, the prosecutor in good faith, and with reasonable grounds to believe the evidence admissible, states what he claims to be the substance of such evidence to the jury, it does not follow that his conduct in so doing, is censurable, because in the further progress of the trial, as in this case, the court rules out said evidence, when offered, as improper. There is much doubt as to whether the matter complained of is a part of the record, so as to require us to pass upon the question presented; but, in view of the doubt, we may say that, conceding it to be properly of record, we are not warranted, in view of the facts, in holding that the statement was misconduct. We see nothing to indicate bad faith or intentional wrong on the part of the prosecution in making the statement. The evidence, when offered, was ruled out, and

it appears, that it worked no prejudice to the defendant.

II. Very many acts of the trial court are complained of as constituting such misconduct as should work a reversal of this case. We cannot consider them all separately. Some of the remarks of the court were proper and timely; others were uncalled for, if not positively improper; and still other acts were, as it seems to us, highly improper, and certainly prejudicial. We discover no act of the court which prejudiced the defendant, save the matter we are

2 about to refer to. In the course of the examination of the defendant's witness, O'Farrell, counsel for the defendant was attempting to show, by the witness, specific acts of unchastity on the part of the prosecutrix, prior to her alleged seduction. The witness was asked if he had sexual intercourse with the prosecutrix at a certain time and place, and failed to answer, whereupon the question was repeated, and the witness appealed to the court to know if he was compelled to answer the question, and was told that he must answer it. Thereafter the following occurred: "The Court: You may answer that question, and answer it promptly now. You know whether you did or didn't, and you don't have to study an hour to know that fact. Q. Did you? (No answer.) Q. Answer it by yes or no. (No answer.) Q. Answer it. The Court: Are you going to answer that question? A. I don't have to answer it. The Court: Yes, you do have to answer it. Mr. Reporter, take this question: Q. Have you been talked with before you come here by

improper, incompetent, and irrelevant. It is an improper and unwarranted question to be asked by the court. The Court: Objection overruled. Answer the question, sir. (Defendant excepts.) Mr. Allen: And, assuming something that has not been shown or developed in the testimony of this case, and it is not a question, with all due respect to the court, not a proper one for the court. The Court: Objection overruled. Answer that. Read the question, Mr. Reporter. (Defendant excepts. Question read by the reporter.) A. I talked with Mr. Allen. Q. How many talks have you had with him? (The defendant makes the same objection. Objection overruled. Defendant excepts.) A. One, I think. Q. One; but only one? Did you have any talk with him or any one of counsel for the defendant, that you should hesitate in answering these questions, sir? (The defendant makes the same objection.) The Court: Answer the question. (Defendant excepts.) A. No, sir. Q. Now, answer the question that has been asked you. Read that, Mr. Reporter." The questions of the court were well calculated to impress the jury with the conviction that the court thought that the witness was avoiding and refusing to answer the question because he had been advised so to do by the defendant and his counsel. The effect of the inference to be properly drawn from the questions asked by the court was not other, or different, than it would have been had his honor directly charged the defendant and counsel with tampering with the witness, and advising him to refuse to answer, even, in obedience to the command of the court. Such a charge, if sustained, might have merited severe punishment of both defendant and his counsel, possibly. Nothing had happened in the examination of the witness, or in the conduct of the defendant, or of his counsel, to warrant a suspicion, even, that any attempt had been made by either to influence the witness in any way,

much less improperly. It was a very grave charge to make, or insinuate, and the effect of the court's questions must have been highly prejudicial to the defendant. Besides, they were calculated to shake the confidence of the jury in the testimony of this witness generally, as well as in the evidence of every witness, adduced on behalf of the defendant. If the defendant and his counsel were guilty of thus attempting to impede proper legal inquiry in case of this witness, and to shape the examination by such improper means for the accomplishment of their own ends, why may not the jury very properly conclude that they would do the same thing as to all of the witnesses, and thus, perhaps, suppress the truth, or improperly color it to suit the necessities of the defendant? Surely, no one can say that the action of the court did not imperil the defendant's case, and rob the testimony adduced by his side of its force and strength. Besides, the court had no right to intimate that counsel had resorted to unwarranted and disreputable methods in coaching the witness, when there was nothing which could be a proper ground for such a charge. The record indicates that this case was hotly contested, and that counsel on both sides were not always in a proper frame of mind, and it may be that the acts of the court above mentioned were in a measure induced by the unnecessary wrangling of counsel. Certain it is that the court was in some manner led into doing a wrong which, though no doubt unintentional, was none the less a grave mistake, and fraught with great prejudice to the defendant. It must be remembered that jurors watch courts

about the case. Every remark dropped by the court, every act done by him during the progress of the trial, is the subject of comment and conclusion by jurymen. Hence it is that judges presiding at trials should be exceedingly discreet in what they say and do in the presence of a jury, lest they seem to lean towards or lend their influence to one side or the other. As is said in *Wheeler v. Wallace*, 53 Mich. 355 (19 N. W. Rep. 34): "It is nevertheless possible for a judge, however correct his motives, to be unconsciously so disturbed by circumstances that should not affect him, as to do and say, in the excitement of a trial, something, the effect of which he would not, at the time, realize, and thereby accomplish a mischief that was not designed." Such seems to have been the fact in this case. As we have indicated, the misconduct we have been discussing was so great, and so prejudicial, as to require us to reverse this case. *People v. Abbott*, 101 Cal. 645, 36 Pac. Rep. 129; *Id.*, 34 Pac. Rep. 500.

III. Complaint is made of the conduct of counsel for the state during the progress of the trial. We do not discover any such misconduct as could have worked any prejudice to the defendant.

IV. Many errors are claimed as to the rulings of the court in admitting and excluding testimony. The sheriff testified that after he had received the warrant for the defendant's arrest he went to Okoboji, 8 and made search for the defendant, and did not find him, and left the warrant with one Wilson to arrest the defendant. On cross-examination, he was asked if he had not been informed the day before that, by defendant's father, that he would have the boy come up the next morning, and surrender himself, and answered, "Yes, sir." The answer was stricken out as not being proper cross-examination. Other questions touching the same matter were excluded for the same reason. These rulings were erroneous.

The state was attempting to show that the defendant was secreting himself, or attempting to avoid arrest, as a fact tending to show his guilt. It was proper to show the facts sought on cross-examination for the purpose of affecting the credibility of the sheriff's statement that he could not find the defendant, as tending to show why he would likely not make much of an effort so to do, in view of the information he possessed. It was also proper as tending to overcome any inference which might be drawn from the direct examination of the officer to the effect that the defendant was endeavoring to evade arrest.

V. Evidence was introduced to show that the prosecutrix had been associating with a man named Vance, and that he was a man of bad moral character, and an associate with lewd women. Upon
4 cross-examination of a witness as to Vance's bad moral character, plaintiff's counsel, over the defendant's objection, was permitted to ask the witness whether or not he had heard various persons, mentioning their names, speak of Vance's bad character. This was also error. It did not appear that the persons whose names were mentioned, lived in Vance's neighborhood, or that they ever knew Vance, or ever heard of him or of his character; and as to some of them, it did not appear where they lived. If a witness on character may be impeached or discredited by showing that persons he has not mentioned, and who are not shown to have ever heard of the man whose character is in question, and who are not shown to have even resided in his neighborhood, or to have had any means of knowing as to his character, then such a witness may always be discredited. While it would have been proper to have inquired of the witness as to what persons he had heard discuss the character of Vance, it was not proper to attempt to overcome the weight of his evidence by showing that persons he

never heard of, or who, so far as appears, never knew Vance, and never heard of him, had never been heard to say anything against his character.

VI. It is urged, that the evidence did not warrant the conviction of the defendant. In view of a re-trial, it is not proper for us to now discuss the weight and sufficiency of the evidence.

VII. Complaint is made of the action of the court in giving and in refusing to give instructions. We have carefully examined the instructions refused, as well as those given, and discover no error in the court's action. In so far as the instructions asked were correct, they were embodied in the charge of the court.

VIII. It appears, that certain papers which the jury should not have had, unless by consent of parties, were sent to the jury room. It is said, that they were improperly sent to the jury. As this case is to be re-tried, and counsel will, doubtless, see to it that improper papers do not go to the jury on the re-trial, we need give the matter no further consideration.

IX. But one question remains for consideration. Several persons were examined as witnesses on part of the state, and against defendant's objection, whose names were not indorsed upon the indictment, and who, in fact, were never before the grand jury, and it is claimed no notice was served upon the defendant of the state's intention to use them as witnesses on the trial. No complaint is made as to the form of the notice which appears in the record, but it is urged that there was no proper evidence that it had been served upon the defendant. The return is defective in that it fails to show that the person making the service was an officer, and the return is not
5 sworn to. When formal service is made of such a notice, the return should be such as is required in case of service of original notices, or it

should be shown by other evidence that notice was in fact given to the defendant, as the statute requires. We conclude that there was no evidence before the court showing that proper notice had been given the defendant. For the reasons heretofore given, the judgment below must be REVERSED.

R. H. ALLEN V. BARRETT & CARLTON, *et al.*, Appellants.

Damages for Settling Fire: INSURANCE AS A DEFENSE. Defendant, in an action to recover damages for the negligent burning of a building, cannot claim a reduction of damages in the amount paid to plaintiff by an insurance company, especially where plaintiff has agreed to reimburse the insurance company if he recovered of defendant.

VALUE OF DEFENDANT'S PROPERTY DESTROYED: *No defense.* Evidence as to the value of the property of defendants, destroyed by a fire, which is charged to have been negligently set by them, is not admissible in an action against them for the destruction of premises, by said fire communicated from their building.

RIGHT OF ACTION BY BAILEE. A bailee in possession of goods for the purpose of sale, has such an interest as to enable him to maintain an action for injury to, or the loss of, the property, from the negligence of another.

Negligence in Settling Fire: JURY QUESTION: *Facts stated.*

Inadmissibility of Evidence for Certain Purposes: ASKING INSTRUCTIONS. In an action for damages caused by fire negligently set out by defendant's agent, who was also a party defendant, declarations and admissions made by the agent after the fire, are admissible against him, and in the absence of any special objection that such evidence was not admissible against the other defendants, or any request to the court to so charge, the admission thereof cannot be made a basis for error.

Appeal from Sac District Court.—HON. C. D. GOLDSMITH, Judge.

WEDNESDAY, DECEMBER 9, 1896.

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by jury. Verdict and judgment for the plaintiff. Defendants appeal.—*Affirmed.*

Jas. H. Tait, R. M. Hunter, and Wright & Baldwin
for appellants.

J. C. Cook for appellee.

ROTHROCK, C. J.—I. Barrett & Carlton is a partnership firm, composed of T. A. Barrett and D. D. Carlton. Guy Carlton was in the employ of the firm as a general clerk and salesman. The partnership and the individual members thereof and Guy Carlton were made parties defendant in this action. The partnership was engaged in general merchandise business in the village of Early, in Sac county. The plaintiff was engaged in the agricultural implement business in the same place. On the thirteenth day of September, 1893, a warehouse of the defendants in the rear of their main store building took fire and was totally destroyed. The fire spread to other buildings near by, and they were consumed, and in the conflagration, a warehouse belonging to the plaintiff, in which a large quantity of agricultural implements and other merchandise were stored, was burned, with all its contents. This action was brought against the defendants as above named. It is averred in the petition that the fire which destroyed all of said property was caused by the negligence of Guy Carlton, in setting fire to a collection of rubbish and combustible material so near a warehouse belonging to the defendants that it was burned, and caused the destruction of plaintiff's property. In the rear of the defendants' salesroom, and some twenty-five feet away, they had a wareroom in which they stored goods. The fire which, it is claimed, destroyed the buildings and contents, was kindled by Guy Carlton in this vacant

space. It is admitted that the said warehouse was the first building burned, and there is no question that all the other property was destroyed by the fire which burned the defendants' warehouse. The question of fact in the case, to which all of the testimony of the witnesses was directed, was whether the fire which burned the property originated from the fire set out in the rubbish by Guy Carlton, in the vacant space near the defendant's warehouse. There is no real question that, if the property of the plaintiff was destroyed by the negligence of Guy Carlton, all of the defendants are liable for the damages.

1 It is earnestly contended in behalf of appellants, that the verdict is not supported by the evidence, and that the jury in the case were controlled by passion and prejudice. It is not our practice to review the testimony of the witnesses. An examination of all the evidence in the case shows, that there is such a conflict, that every question of fact was for the jury to determine. There was direct conflict on some of the facts. There were many collateral facts, about which the witnesses differed. There is no doubt that, when the first building commenced to burn, there was a strong wind blowing from the direction where the rubbish was set on fire by Carlton, to the building, and there is a conflict as to whether there was any wind when the fire was kindled. Then, again, there is evidence tending to show, that the warehouse took fire from the inside, and not the outside. There was other evidence to the effect, that wide doors in the building next to the burning rubbish were open, so that the fire from the burning bonfire

rubbish which Carlton burned, and whether, when the velocity of the wind increased before the building took fire, Carlton took proper means to extinguish the bonfire. And there is conflict on the question as to the distance from the fire to the building. A number of special interrogatories, requested by each party, were submitted to the jury. Some of them involved many collateral facts, not at all controlling the finding of the jury upon the ultimate fact of liability. A point is made by appellants, that some of the answers to these interrogatories were without support in the evidence. We do not think this position is well taken. The evidence shows, without question, that the relation of the defendant, Guy Carlton, to the members of the firm and to the partnership, was such, that if the fire was caused by his negligence, the other defendants are liable for his acts. We have given a general statement of the effect of the testimony of the witnesses. Our conclusion is, that so far as the sufficiency of the evidence is concerned, the verdict must be sustained.

II. Evidence was introduced by the plaintiff showing that, after the fire, Guy Carlton made certain admissions which tended to show that he was negligent in setting out the fire. This evidence was
2 objected to because it was irrelevant, incompetent, and immaterial. The objections were overruled, and exceptions were taken, and this ruling of the court is claimed to be erroneous and prejudicial. The position of counsel is not well taken. The argument in support of the objection is that the admissions of Carlton, made after the fire, are not admissible, because they were no part of the *res gestæ*, or transaction itself. He was a party defendant, and they were admissible as against him. If it was thought they were not evidence against the other defendants, that objection should have been made, and the court

should have been asked to instruct the jury on that feature of the case.

III. The defendants offered evidence to show the value of their own property which was consumed by the fire. The evidence was rejected. Complaint is made of this ruling. It was clearly right. There is no ground upon which it was admissible.

IV. It appeared in evidence that the property of plaintiffs which was destroyed by the fire was insured for one thousand dollars, and that the insurance company paid the amount of the insurance to the plaintiff before the trial of this case, under the agreement that, if the plaintiff recovered in this action, he was to repay the one thousand dollars to the insurance company, with interest at six per cent. The defendants requested the court to charge the jury that the one thousand dollars insurance money should be deducted from the damage, if any, which it should be found the plaintiff was entitled to recover. The instruction was refused, and this ruling is said to be erroneous. Counsel for appellant do not really argue this assignment of error. They merely state that the law does not contemplate reimbursing a person twice for an injury, and plaintiff should not be allowed to receive the insurance money and recover it again from the defendants. It appears to be well settled by the courts that, in such cases as this, the party charged with negligence has no right to claim a reduction of damages in the amount paid to the plaintiff by an insurance company. The reason given for the rule is that there is no privity between the parties, and the defendant is in no position to avail himself of the proceeds of the policy to mitigate, or reduce, the damages which his wrongful act occasioned. As between the defendant and the insurance company, the defendant ought to make compensation to the plaintiff. In

other words, it is no defense to an action like this to show that the property was insured and the policy paid. It is very plain that the party by whose negligent acts the property was destroyed, should respond in damages for the full amount of the injury. After that, it is a question between the insured and the insurance company, as to which shall bear the loss. May, Insurance, section 456, and authorities cited in notes.

V. A large part of the goods destroyed by the fire consisted of agricultural implements which were held by the plaintiff on commission, under contracts with the manufacturers of the implements.

5 We do not think it necessary to refer especially to these contracts. There is no question that the plaintiff held the goods as bailee, for the purposes of sale, and that he had such an interest in them as that he could maintain an action for any injury or loss to the property resulting from the negligence of the defendants. The defendants claim that the owners of the property have a right of action for any loss they have sustained. Whatever the rights of the owners may have been, in case this action had not been commenced, we need not determine. The question here is, may the bailee recover for the destruction of the goods? In Lawson, Bailm. 34, it is said: "The bailee, not having the title, nevertheless has, in addition to the possession of the chattel, a special limited or qualified property in it, which gives him a right of action against any one, whether the bailor or a stranger, interfering with his possession or doing damages to the bailed article." There can be no question that the rule thus stated is correct. In *Shaw v. Kaler*, 106 Mass. 448, it is said: "It has been settled by a long course of decisions that possession is a sufficient title to support an action of trespass or trover against a party having no right. A mere wrong-doer

is not permitted to question the title of a person in the actual possession and custody of the goods whose possession he has disturbed."

Other questions discussed by counsel do not appear to us to be of sufficient importance to require special consideration. We discover no error, and the judgment of the district court is **AFFIRMED**.

STATE OF IOWA V. L. B. ODEN, Appellant.

Adultery: COMMENCEMENT OF PROSECUTION. Though Code, section 1 4003, limits the right to prosecute a married person for adultery, to his wife, this limitation does not apply where the defendant was unmarried when the crime was committed, but married before the finding of the indictment.

Admission of Evidence: HARMLESS ERROR. The admission in evidence of acts of sexual intercourse, subsequent to the date on or about which the act of adultery declared upon in the indictment is charged to have been committed, is not reversible error, where, after the state had elected to stand upon the act testified to as being the first committed, and as occurring on or about the date alleged in the indictment, the evidence as to the other acts was stricken out, on defendant's motion.

Appeal from Sioux District Court.—HON. SCOTT M. LADD, Judge.

WEDNESDAY, DECEMBER 9, 1896.

ON the fifteenth day of November, 1893, the defendant was indicted on the complaint of A. H. Macomber, husband of Hilda Sophia Macomber, for the crime of adultery, alleged to have been committed on or about the sixth day of June, 1893, with said Hilda Sophia Macomber, the defendant then being a single man. A verdict of guilty was returned, and judgment that the defendant be imprisoned in the penitentiary for the period of one year and four

months, and for costs, was entered thereon. Defendant appeals.—*Affirmed.*

Palmer & Van Dyke for appellant.

Milton Remley, attorney general, for the state.

GIVEN, J.—I. On the trial, the defendant called Mrs. S. Oden, who testified that she was married to the defendant on October 13, 1893, and had lived with him ever since that date. The state moved to strike this evidence, as “incompetent, immaterial, and irrelevant,” which motion was sustained, and of this appellant complains. It will be observed that the crime is alleged to have been committed on or about the sixth day of June, 1893, and that the defendant was then a single man. It will also be noticed that the indictment was found on the fifteenth day of November, 1893, which was after the marriage of this witness and the defendant; and the question is whether, the defendant being married at the time complaint was made, it could be made by any other than his wife. Section 4008 of the Code provides that, “when the crime is committed between parties only one of whom is married, both are guilty of adultery, and shall be punished accordingly. No prosecution for adultery can be commenced but on the complaint of the husband or wife.” In *State v. Roth*, 17 Iowa, at page 341, this court said: “The object of the limitation of the statute, in our view, was to exempt the party from prosecution, unless the husband or wife of such party should commence the prosecution against him or her.” In *State v. Wilson*, 22 Iowa, at page 364, it is said: “That it was competent for the injured wife of the paramour of the defendant to make complaint, and that the grand jury were not bound to indict both or neither.” In that case, the accused was an unmarried

man, and the complaint was by the spouse of the other party to the crime. In *Bush v. Workman*, 64 Iowa, 206 (19 N. W. Rep. 910), wherein both parties to the crime were married, it was held that the statute "forbids prosecutions for adultery except when commenced by the spouse of the person prosecuted." In *State v. Mahan*, 81 Iowa, 121 (46 N. W. Rep. 855), it was held that the indictment for the crime of adultery may be good, although it does not show that the prosecution was commenced upon the complaint of the husband or wife of the accused, nor that the latter is unmarried, and that, if the defendant was married, the failure of his wife to make complaint was a matter of defense, which he was required to prove in order to take advantage of it. It is entirely clear from these rulings, that, if the defendant had been married at the time of the alleged commission of the offense, he could only be prosecuted upon the complaint of his wife; but the question is whether, under the facts of this case, the limitation of the statute applies. If it does, this evidence was material, and should have been admitted; otherwise, not.

In *State v. Bennett*, 31 Iowa, 24, it is said that this limitation "leads to the inference that the offense is rather a crime against the partner to the marital relation than against society in general. So long as the injured husband or wife suffers the wrong in silence, society, notwithstanding the injury to public morals, is without redress." In *State v. Corliss*, 85 Iowa, 18 (51 N. W. Rep. 1154), it is said of this limitation: "This provision is grounded in the regard which the law has for the marital relation, and the right of the husband and wife to condone the wrongs of either towards the other." Whether we consider adultery as an offense against the public or against the injured spouse, or against both, the limitation is, however, grounded, not in the interests of the public, but in

the fact that the offense is primarily against the innocent partner. In June, 1893, the defendant had no wife to be wronged by the crime charged; no wife to whom the law extended the right to condone or to prosecute for the crime charged. At that time, the defendant was liable to prosecution on the complaint of the husband of Mrs. Macomber. It may be questioned whether defendant could now be prosecuted for that offense, on the complaint of the wife that he has married since its alleged commission. There would certainly be some force in the claim when she was not injured within the contemplation of the statute, and that she was not entitled to condone, or to prosecute for an offense that was not committed against her more than against any other person of the general public. However this may be, we do not determine; but, in view of the reasons upon which the limitation of the right to prosecute is grounded, we reach the conclusion that that limitation does not apply in this case. It follows from this conclusion that the evidence stricken out was immaterial, and therefore the motion was properly sustained.

II. To convict, it was incumbent upon the state to show that Hilda Sophia Macomber was the wife of the complainant, A. H. Macomber, at the time of the adulterous intercourse alleged. The transcript shows that both Mr. and Mrs. Macomber were asked when they were married, and that each answered that it was in 1893, she giving the date as December 28. If this is correct, the evidence fails to show that they were husband and wife, or that Mrs. Macomber was a married woman, at the time of the alleged adultery. Taking all the evidence together, it is perfectly manifest that their marriage was in 1883, instead of 1893, and that 1893 erroneously appears, either from an inadvertence on the part of the witnesses, or of the reporter. Under all the evidence, there is no room for

reasonable controversy as to the date of their marriage being in 1883.

III. Defendant's objections to certain questions asked the witness, Mrs. Macomber, were overruled. The objections were upon the ground that the questions were leading and suggestive. These objections were not well founded, and, like a number of others appearing in the record, are not of sufficient importance to merit further notice.

Mrs. Macomber, having testified that the defendant had sexual intercourse with her the first time June 6, 1893, further testified, over defendant's objection, to subsequent acts of sexual intercourse, the last being about the middle of September. Acts subsequent to that of on or about June 6, were not admissible. See *State v. Donovan*, 61 Iowa, 278 (16 N. W. Rep. 130.)

Upon the conclusion of the evidence on behalf of the state, defendant moved to strike all the evidence tending to show acts of sexual intercourse, other than the first; and this motion was sustained, and
2 the state required to elect upon which act it would stand, and the state elected to stand upon the act testified to as being the first committed; namely, on or about June 6, 1893. In view of this action of the court, there was no prejudice to the defendant in admitting the evidence thus excluded.

IV. Appellant's further contention is, that the evidence fails to support the charge of adultery, on or about June 6, 1893. True, there is a conflict in the evidence on that subject, but we think the verdict has ample support.

Complaints are made against the instructions, grounded upon the claim that defendant, being a mar-

was the wife of A. H. Macomber at the time the adulterous act relied upon was committed. The instructions are in harmony with the views we have expressed on these contentions. We find no error in the record, prejudicial to the defendant, and the judgment of the district court is, therefore, **AFFIRMED**.

JOHN P. COOK, Contestant, Appellant, v. JOHN FISHER, Incumbent.

Elections: AUSTRALIAN BALLOT LAW. A ballot should not be excluded

- 1 as bearing an identification mark, under Acts Twenty-fourth General Assembly, chapter 33, where the mark relied on was made by the election officers, and consisted merely of an alteration or addition to the name of the candidates, which was also made on other ballots, so that it does not afford any means of identifying any particular ballot.

OFFICIAL BALLOT. Though chapter 33, Acts Twenty-fourth General

- 1 Assembly, provides particularly how the official ballot shall
- 4 be prepared, corrected, and furnished, the making of said addition
- 6 or alteration did not prevent said ballots from being official ballots, and, hence, did not require the rejection of the vote of the precinct.

CONSTRUCTION OF STATUTE. Such act is not so far mandatory as to

- 5 require that a voter shall be deprived of his right to vote, because
- 6 a technical mistake is made in printing the name of a candidate.

Estoppel to Object: BY OFFER OF SIMILAR EVIDENCE. A party to an

- 2 election contest is not estopped from objecting that the entire vote of a township is illegal, because the ballots cast therein are all illegal, by offering in evidence ballots cast therein, for himself, where he couples his offer with the condition that they shall be counted for him, only, in case the ballots are declared legal, and the vote of the township held valid.

Appeal from Polk District Court.—**HON. T. F. STEVENSON, Judge.**

WEDNESDAY, DECEMBER 9, 1896.

THESE parties were opposing candidates in the Fifth supervisorial district of Polk county, for the office

100	27
106	100
100	27
110	563
100	27
131	333
131	335
100	27
133	103

of supervisor, at the general election in 1894. The board of canvassers declared said John Fisher elected, whereupon John P. Cook instituted proceedings to contest said election, and the court of contest found and declared in favor of John P. Cook, from which John Fisher appealed to the district court. The district court found in favor of the incumbent, John Fisher, and contestant, John P. Cook, appealed to this court. The issues and facts appear in the opinion.—*Affirmed.*

Bishop, Bowen & Fleming and John McLennan for appellant.

Day & Corey for appellee.

GIVEN, J.—I. There is no dispute as to the facts, and except in one particular, they are fully stated by the appellant, as follows: The only ground upon which this appeal is based, and which the appellant desires to bring to the attention of this court, is based upon the changes made in the official ballots, by the election judges in Four Mile township, that being one of the voting precincts of the Fifth supervisorial district of Polk county. In the supervisorial district referred to, John Fisher and John P. Cook were candidates. In said township there had been a township ticket nominated, and nomination papers relating thereto had been filed in the office of the county auditor. Among others nominated for township officers, was "A. Winterowd," for township assessor. The nomination papers were indistinctly written, and the county auditor, in preparing the official ballot, read the name to be "R. Winterowd." The official ballot was prepared and on file in the office of the auditor at the time, and for the period, required by law. No objection having been made, and no correction

suggested, the official ballots were, on the morning of election day, sent by proper messenger to the polling place, in said Four Mile township, the same being about eight miles from the court house in
1 Des Moines. Upon the ballots being opened by the election board, upon its organization, the judges discovered what appeared to them to be an error in the ballots, in this: that the initial of Mr. Winterowd, candidate for assessor, should have been "A.," instead of "R.," as the same was printed in the ballots. The judges decided to change the ballots, and, voters having presented themselves, one of the judges, with a pencil, added the letter "A.," as an initial to the name of Mr. Winterowd, making it "A. R. Winterowd," and several of these ballots were voted. In one or two instances such judge marked the letter "A." over the letter "R.," changing it in that way to read "A. Winterowd." After eight or ten ballots had been voted, the judges procured a large stamp in form of the letter "A.," about three times as large as the type of the original letters in which the name was printed, and with this stamp, they erased the letter "R.," and made the name read, in each subsequent ballot used, "A. Winterowd." It will thus be seen that the only question involved is whether or not the judges were, in the first place, authorized to make changes in the ballots of the character in question; and, in the second place, whether, having assumed the right to make such changes, the same was unauthorized by law so far as to render the ballots void. If the ballots from Four Mile township are entitled to be counted, without respect to the change referred to, then the appellee was duly elected to the office in question. If, on the other hand, the ballots from said township should not be counted, then the appellant was elected to said office.

To this, appellee adds as follows: "The statement of appellant is substantially correct, but needs the following modification: Five ballots only were counted for incumbent, in which the name 'R. Winterowd' was changed by inserting with a pencil the letter 'A.' before the letter 'R.,' making the name read 'A. R. Winterowd.' All the other ballots counted for incumbent were changed by stamping with a rubber stamp the letter 'A.' upon the letter 'R.,' making the name read 'A. Winterowd.' Of the ballots counted for contestant, one was changed in like manner with pencil; and the remainder were changed with the same rubber stamp, by stamping the letter 'A.' upon the letter 'R.'"

II. On the trial, appellant offered in evidence on his own behalf, seventy-nine of said ballots cast for him, and appellee contends that he is thereby estopped from claiming that the same kind of
2 ballots cast for appellee are illegal. We understand from the record that this offer was upon the condition that these ballots should be counted in the event that the entire vote of the township was not rejected. We do not think that appellant should be
3 estopped from questioning the legality of the vote of the township because of this offer.

Another contention that we will dispose of in this connection is the claim of appellant that all of said ballots bear distinguishing marks, and should therefore be rejected. All those changed with the stamp are alike, and not distinguishable from each other. Those changed in pencil to read "A. R. Winterowd" were, so far as appears, alike, and not distinguishable from each other; and the same is true of those changed in pencil from "R." to "A." Winterowd.

read "A." Winterowd. None of them bear any distinguishable mark made by the voter, nor by which it can be ascertained how any one elector voted. Therefore the secrecy of the ballot was preserved. In *Whittam v. Zahorik*, 91 Iowa, 23 (59 N. W. Rep., at page 62,) in considering the provision of section 27, Acts Twenty-fourth General Assembly, chapter 33, against marking ballots, this court said: "This provision is designed to prevent identifying marks by any person, including the voter, and prohibits such marking, by necessary implication. If it is done by some one without the knowledge of or consent of the voter, as by one of the election officers, it should not prevent the counting of the ballot; but, where it is done by the voter in preparing his ballot, it is a violation of the law, and, not being such a marking as the law sanctions, the ballot should not be counted." It is further said: "It is evident that in such cases, and in others where the unauthorized mark is not of a character to be used readily for the purpose of identification, the ballots should be counted; but where the unauthorized marks are made deliberately, and may be used as a means of identifying the ballot, it should be rejected." There is not sufficient ground for rejecting any of these ballots because of distinguishing marks.

III. We now inquire as to the real contention in this case, namely, whether the entire vote of Four Mile township should be rejected because of the change in the ballots made by the judges of
4 election. This election was held under chapter 33, Acts Twenty-fourth General Assembly, entitled, "An act to provide for the printing and distribution of ballots at public expense, and for the nomination of candidates for public offices; to regulate the manner of holding elections; and to enforce secrecy of the ballot." This act provides at length and with much particularity, the manner in which

official ballots shall be prepared, corrected, furnished, and used, and provides that no other ballots shall be used, or counted. Appellant contends that, by the change made by the judges, these ballots ceased to be official ballots; that the provision of the statute that none other than official ballots shall be used, or counted, is mandatory, and therefore all the vote of Four Mile township should be rejected. Appellant cites *West v. Ross*, 53 Mo. 350; *State v. Frazier*, 98 Mo. 426 (11 S. W. Rep. 973); *People v. Board of Canvassers of Onondaga County* (N. Y. App.) (29 N. E. Rep. 327); *State v. Smith*, 94 Iowa, 616 (63 N. W. Rep. 453); and other cases, —to the effect that courts must follow the provisions of the statute without regard to the consequences that may follow. This contention is not disputed, but, when the consequences are such as appellant demands, we may well inquire whether the law requires them. These ballots were prepared and furnished to the judges of the election by the officer and in the manner required. They were official ballots, correct in every particular, except the initial of A. Winterowd, a candidate for assessor. The judges, without leaving any distinguishing marks, corrected all the ballots furnished, and made them just what they should be. These correct ballots were furnished to the voters, and cast by them in the manner prescribed. There is no pretense that any fraud or wrong was intended, or could or did result from the mistake of the auditor, or the action of the judges, to any one; nor that the vote cast is other than a fair and free expression of the choice of the voters. We are asked, upon this state of facts, to disfranchise the voters of Four Mile township who voted at that election, and we should surely inquire diligently whether the statute demands this, before so declaring. Did these ballots become other than official ballots by reason of the correction made by the judges? It is true, the law gave them no authority

to make the correction. It is true, the courts should adhere tenaciously to every provision of the law looking to the purity of the ballot, and approve of no act or omission that renders fraud or injustice possible. We have seen that these ballots, as furnished to the voters, were correct in every particular; that they were just what the law required they should be as official ballots; and that no fraud or injustice did or could result from their use as official ballots. Under this state of facts, we think they did not lose their character as official ballots, because of the correction made by the judges. This view has support in cases hereinafter cited.

IV. While it might be said that the foregoing conclusions dispose of the case, yet we proceed to consider the claim of appellant that the statute is mandatory as to the manner of preparing and correcting official ballots, and in providing that none other
5 shall be used or counted. Appellant cites and quotes from *People v. Board of Canvassers of Onondaga County, supra*, a case considered at great length, there being three separate opinions by the judges concurring, and two by the judges dissenting. The case was under a statute requiring that the candidates of the different parties be printed on separate ballots, and indorsed on the outside as an official ballot with the number of the district in which it was to be used. By accident or mistake, the ballots of the Republican nominees, though properly prepared, were sent to the wrong districts, and voted in those districts. The mistake being only as to Republican ballots, and the indorsement being open to view when the ballot was folded, it constituted a distinguishing mark on the Republican ballots, and it is upon that ground that they were held by the majority to be illegal. While that case is different in its facts and in its inquiries from this, there is much said therein that

is applicable to our inquiry, but nothing in conflict with the conclusion we reach. In *State v. McKinnon*, 8 Or. 493, it was held, under a statute requiring that all ballots be on plain white paper, that ballots on colored paper were illegal. The court says: "The correct principle is announced in the case of *Kirk v. Rhoads*, 46 Cal. 399, which holds that a ballot cast by an elector in good faith, should not be rejected for failure to comply with the law in matters over which the elector had no control, such as the exact size of the ticket, the precise quality of the paper, or particular character of type or heading used, where the law has provisions to that effect; but if the elector wilfully neglect to comply with requirements over which he has control, such as seeing that his ballot, when delivered, is not so marked that it may be identified, the ballot should be rejected. Am. Law Elec. section 403." In *Reynolds v. Snow*, 67 Cal. 497 (8 Pac. Rep. 27), cited by appellant, the court held that a ballot not conforming to the size required, was properly rejected. This was in harmony with the rule in 46 Cal., quoted above. The voter must be presumed to have known that the ballot was not as required. It was also held that the fact that the voter erased the name of contestant, and wrote in the name of defendant, did not vitiate the ballot. Other cases cited by appellant are as to the duty of the court to enforce the statute, without regard to consequences. The language of the court in *Miller v. Pennoyer* (Or.) (31 Pac. Rep. 830), is so directly in point and in harmony with our views that we quote it at some length. The case was under a statute similar to ours as to the preparation of ballots, and providing that "the name of each person nominated shall be printed upon the ballot in but one place." The court says: "We are

in both the People's and Democratic groups of electors did not deprive the voters who cast such a ballot of the elective franchise, or the candidate for whom it was cast of the benefit of such a vote. Under the law as it now exists, neither a voter nor a candidate has any control or voice whatever in the arrangement and publication of the names or forms of the ballot; and the voter is either compelled to vote the 'official ballot' or not vote at all. In such case, in the absence of an affirmative declaration in the statute that a ballot containing the name of a candidate in more than one place is void, and shall not be counted, we are unable to agree to the doctrine that an error of the county clerk in construing a doubtful provision of the law should disfranchise a large number of voters who are in no way responsible for the error or mistake. And such is the effect of the decisions under similar ballot laws. *Bowers v. Smith* (Mo. Sup.) (17 S. W. Rep. 761, and 20 S. W. Rep. 101); *Allen v. Glynn* (Colo. Sup.) (29 Pac. Rep 670); *Northcote v. Pulsford*, 44 Law J. C. P. 217. The law is 'mandatory,' in the
6 sense that it demands and requires the county clerks, in the preparation of the 'official ballot,' to strictly comply with all its provisions, but not in the sense that a voter's right to exercise its elective franchises will be lost, because of some technical mistake of the county clerk in printing the names of candidates upon the ballots. Such a construction of the law would not only render an election invalid on account of an honest mistake of the county clerk, but would open the door to the gravest fraud. It would place the power in the hands of a dishonest officer to disfranchise the voters of his county, as well as cause the defeat of any particular candidate. To defeat the will of the people or a particular candidate, it would only be necessary to furnish the electors, or a part of them, with ballots slightly variant or different from

those prescribed by law. Unless the law is clearly mandatory, or in some way declares the consequences of a departure from its provisions, the court ought not to defeat the will of the people, when fairly expressed, because of some technical error or mistake in the form of the ballot; and in this case there is no claim or suggestion of fraud on the part of any one, or that the returns now in the possession of the secretary of state do not correctly represent the will of the people, as expressed at the polls." There is an affirmative declaration in our statute, that none but official ballots shall be used or counted, and in that it is mandatory. There is, however, no affirmative declaration that official ballots, corrected as these were, shall therefore cease to be official ballots, nor that such ballots, when legally cast, shall not be counted.

For the reasons stated, we conclude that the judgment of the district court is correct. Our conclusion finds support in the following cases: *Bowers v. Smith* (Mo. Sup.) (17 S. W. Rep. 761); *Smith v. Harris* (Colo. Sup.) (32 Pac. Rep. 616); *State v. Russell* (Neb.) (51 N. W. Rep. 465); *State v. Van Camp* (Neb.) (54 N. W. Rep. 113); *Parvin v. Wimberg* (Ind. Sup.) (30 N. E. Rep. 790); *State v. Gay* (Minn.) (60 N. W. Rep. 676); *Sanner v. Patton* (Ill. Sup.) (40 N. E. Rep. 290); *State v. Walsh* (Conn.) (25 Atl. Rep. 1).—AFFIRMED.

W. L. KING, Appellant, v. W. A. BLAIR AND J. H. LAYCOCK.

Venue. **AGENCY:** *Construction of statute.* A corporation operated a boat line in a given county, and had an agent therein who solicited freight and collected pay for it. An excursion, out of the ordinary course of the corporation's business, was run, and plaintiff was wrongfully landed in the progress of the excursion. *Held*, his action could not be brought under Code, 2585, in the county where the agent did said business of soliciting and collecting

Appeal from Keokuk Superior Court.—HON. H. BANK, JR., Judge.

WEDNESDAY, DECEMBER 9, 1896.

ACTION to recover damages for wrongfully, wilfully, and maliciously landing the plaintiff and his family from a steamboat on an island in the Mississippi river. The defendants presented a motion to change the venue of the case to Scott county, the place of their residence. The motion was sustained. The plaintiff excepted to the ruling, and elected to stand on his exceptions, and the suit was dismissed, at plaintiff's cost, and he appeals.—*Affirmed*.

J. F. Smith for appellant.

Anderson & Waggoner for appellees.

ROTHROCK, C. J.—The defendants are residents of Scott county, in this state. It appears from the affidavits filed in support of the motion for a change of the place of trial to Scott county, and the affidavits in resistance to the motion, that, at the time the action was brought, the defendants were the owners of a steamboat which they ran on the Mississippi river, from the

city of Keokuk to the city of Quincy, in the state of Illinois. They made regular trips between the points named, and they had an agent at Keokuk, named Hutchinson, who at times solicited freight and collected freight bills for the boat and its owners. On Sunday, May 20, 1894, two trips were made which were not within the ordinary business of the boat. They were pleasure trips, from Keokuk to a point on the river where one Kelly, the commander of an army, had his troops in camp. Hutchinson had no agency whatever in regard to these trips. He was in no way connected with them, either as soliciting passengers or selling tickets for the voyage. The passengers went on the boat, and paid their fares to the clerk of the boat. The fare was twenty-five cents for the round trip.

The question to be determined is whether the action was properly brought in Lee county. Section 2585 of the Code is as follows: "When a corporation, company, or individual, has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located." The affidavits filed by the parties show very clearly that this suit did not grow out of the business of the Keokuk agency. It had no connection whatever with any office or agency at Keokuk. It appears to us that the superior court rightly determined that the suit was brought in the wrong county.—**AFFIRMED**

C. B. WORTHINGTON AND GEORGE A. DISSMORE, TRUSTEES, v. THE OAK AND HIGHLAND PARK IMPROVEMENT COMPANY, *et al.*, Defendants, CAROLINE E. BYERS, Intervener, Appellant.

Breach of Contract: TEACHERS: Damages. A teacher wrongfully
5 discharged before the expiration of the school year for which she was employed, may recover the entire contract price where, after reasonable effort, she was unable to secure another position, although she attempted to start a school of her own, which proved to be a financial failure.

Receivers: CONTRACTS BY. A receiver of a corporation authorized
1 to conduct a college and employ teachers for the "ensuing" year,
2 cannot repudiate a contract with a teacher for the ensuing year.
3 merely, because the college, or her particular department, proves
4 to be a financial failure, although the order empowering him gave him authority to make and adopt contracts, such as he might deem "necessary and *advantageous* to the successful operation of the college "

Appeal from Polk District Court.—HON. THOMAS F. STEVENSON, Judge.

WEDNESDAY, DECEMBER 9, 1896.

THE appeal in this case involves the validity of a contract alleged to have been made by Caroline E. Byers with L. M. Mann, receiver of the Highland Park Improvement Company, by which contract she alleges she was employed as a teacher by said receiver, and wrongfully discharged from said employment, in violation of said contract. There was a full hearing before the court, and it was found that the intervener was entitled to recover thirty dollars, which sum was ordered to be paid from the funds in the hands of the receiver. Caroline E. Byers, intervener, appeals.—*Reversed.*

Cummins & Wright for appellant.

C. C. & C. L. Nourse for appellees.

ROTHROCK, C. J.—I. The petition in the main action was filed on the twenty-seventh day of July, 1893, by Worthington and Dissmore, trustees, to foreclose a trust deed executed by the defendant, the Oak & Highland Park Improvement Company, to secure payment of certain negotiable bonds. The appointment of a receiver was demanded to take possession of the property of the corporation, including the Highland Park College, owned and operated by the improvement company. On the same day that the petition was filed, the following order was made by the court: "And now, this cause coming on to be heard upon the application of the plaintiffs for the appointment of a receiver, the plaintiffs appearing by C. C. & C. L. Nourse, their attorneys, and the defendants, the Oak and Highland Park Improvement Company and Highland Park Normal College by E. J. Goode, their attorney, and O. H. Longwell by Barcroft & McCaughan, his attorneys, and L. M. Mann in person, and all parties consenting thereto, it is ordered and adjudged that L. M. Mann be, and he is hereby, appointed receiver of the property described in the mortgage, with full authority to take possession thereof, and receive, manage, and control the rents and income arising therefrom. It is further ordered that the said receiver have authority, and he is hereby directed, to continue to operate

is also hereby authorized to employ the present president, O. H. Longwell, to take charge of the educational department of said college, upon such terms as he may agree upon with the said Longwell, and also to recognize and adopt any contracts now outstanding made by the said Longwell for the employment of professors for help for the ensuing year, or for printing and advertising for the ensuing year, and for work and labor and supplies for the ensuing year, so far as the said receiver may deem the same necessary and advantageous to the successful operation of the college. The receiver is also authorized to effect an insurance of the property, and to pay all taxes and assessments against the same. And the receiver is further authorized to issue receiver's certificates in payment of, or to raise money for the employment or purchase of work and labor, material, or supplies, as above authorized, and the same shall be a first lien upon any funds coming into his hands by virtue of his receivership; and the receiver has leave to apply to the court for such further order, or direction, as he may deem necessary from time to time to carry out the above orders. And it is further ordered that the said L. M. Mann, give bond in the penal sum of twenty thousand dollars (\$20,000), with sureties to be approved by the clerk of this court, conditioned as required by law, for the faithful performance of his duties. Dated, July 27, 1893. [Signed.] C. P. Holmes, Judge." The intervener had been an instructor in the college for two or three years. The school year commenced in the month of August, and the receiver was appointed during the summer vacation. The intervener claims that, before the close of the school year in the summer of 1893, O. H. Longwell, the president of the college, entered into an oral contract with her, by the terms of which she was engaged as an instructor for the ensuing year, at the same rate of compensation

which she had theretofore received. She further averred that, after said Mann was appointed receiver, he completed said agreement for employment, by which it was contracted that she should continue as an instructor in the same branches of learning in which she had before been employed. She averred that she entered upon the performance of her duties under said contract at the opening of the college year, and continued under the contract until September 30, 1893, when the said receiver dismissed and discharged her from further service as an instructor under said contract; and she demands that the receiver be required to pay her, from the funds in his hands, the sum of one thousand one hundred and seventy dollars, the balance which would be due for the year's service if she had not been wrongfully discharged. It is admitted in the answer that the intervener was employed by the college, beginning with the fall of 1890, and ending with the summer of 1893; and it is admitted upon information and belief, that the intervener entered into a contract with O. H. Longwell, the president of the college, for one year, commencing September, 1893, and to continue until the summer of 1894, but that plaintiffs have no knowledge, or information, sufficient to form a belief as to the exact terms of said employment. It is denied that the receiver entered into any contract to employ intervener for the whole of the school year, and that he notified her that he was only acting as receiver, and that he could only employ her for such time as her services should prove to be beneficial in conducting the
2 operation of the college. It is admitted that intervener performed the duties of an instructor for about five weeks under this arrangement with the receiver, and that she was then dismissed from said employment, for the reason that the entire receipts from the department of elocution and physical culture,

of which the intervener was principal, were far less than the salary agreed to be paid her, and said department was no longer beneficial to the interests of the parties owning the property. Other averments of the answer need not be here referred to.

The first question to be considered is whether the intervener was employed by the receiver for the school year. We have stated the respective claims of the parties as to the terms of the contract. There is no dispute that O. H. Longwell, the president of the college, employed her for the ensuing college year. But as the property of the improvement company, including the college, went into the hands of the receiver, the contract with Longwell could not have been enforced as against the receiver. We do not understand that anything is claimed by the intervener for that contract, more than that the receiver recognized it, and adopted it, and made a contract upon the same terms, as he was authorized to do by the order appointing him receiver. The main question of fact, then, is, what was the contract made by the receiver? This must be determined by the evidence. The testimony of the intervener and the receiver are in conflict. And it is to be conceded that she, to say the least, was mistaken in testifying to the contents of a letter that she wrote to the receiver. She claimed in her testimony that the letter was on the subject of her employment for the year. When the letter was produced, it had no reference to future employment. It related to payment of arrears due to her for the previous year. This letter was written at the city of Oskaloosa, where intervener was stopping at the time. Notwithstanding this mistake in the testimony of the intervener, we think her version of the contract made with the receiver is corroborated by many circumstances in the case. The main corroborative fact is found in a letter by the receiver to her,

written on the third day of August, 1893. The following is a copy of that letter: "Des Moines, Iowa, August 3, 1893. Miss Caroline E. Byers, Oskaloosa, Iowa—Dear Friend: Your letter of August 2d is at hand. I was appointed last week by the district court, receiver for the Highland Park College, with authority to operate the same. Mr. Longwell will continue at the educational head of the school, while I will have charge of the finances. I will make good the contracts, that the president has with the teachers the coming year. The school will continue beyond any doubt. Do you wish to stay for the next year? As to pay for last year, I have nothing to do with that. I don't know what the old company will do. Am sorry to hear of your mother's sickness. Your friend, L. M. Mann." This is a distinct promise to make good the contracts that the president had with the teachers for the year. It was an inquiry as to whether she desired to remain in the employment of the college for another year. She went to Des Moines in response to this letter, and, in an interview with the receiver, the arrangement was made. Then there is the circumstance, well known to all the parties, that teachers in colleges are usually hired for the school year; and we have set out the order appointing the receiver, for the purpose of showing that the college was to be continued for a year. We will not occupy space to analyze the order here. It is not necessary to do so. It gave the receiver authority to recognize and adopt any contract made by Longwell, for the employment of professors "for the ensuing year," and for printing and advertising "for the ensuing year." It is true, as claimed by counsel for appellee, that the receiver was to use his judgment and discretion in performing his duties, and make such contracts as "he may find necessary to the successful operation and continuance of the school,"

and such as he might deem "necessary and advantageous to the successful operation of the college."

3 It is said that, if the contract was for one year, it was an imprudent undertaking, and the receiver had authority to revoke and rescind it, in the interest of the college and the creditors. If this were an ordinary decree in case of the appointment of a receiver, there, would no doubt, be force in this position. But this is a case where the representatives of the bondholders, the insolvent corporation, the college, the president of the college, and the receiver, were all before the court, either by attorney or in person, and consented to the decree. It contemplated the continuance of the college for the "ensuing year." The authority was to ratify Longwell's contracts for "the ensuing year." We do not hold that the receiver was required by the decree to employ the instructors for the year, but that he had the authority to do so. Having exercised his judgment as to what was necessary and advantageous for the successful operation of the college, and entered into contracts with instructors, we cannot discover any reason why the contracts should not have been performed. There

4 was no objection to the intervener as an instructor. The receiver testified as a witness that "she was a good teacher." It is true, that the undertaking to carry on the college for the year was a financial failure; and the intervener was discharged, because her department paid but a small part of its expenses. The receipts of the college for the year were between fourteen thousand and seventeen thousand dollars less than the expenses. But that was no reason for repudiating contracts with teachers which were authorized to be made by the decree. Where a contract by a receiver is authorized by the order of the court appointing him, the obligation is

binding, and should be performed. Gluck & B. Rec. section 78, and authorities there cited.

II. The next and only question necessary to be considered, is the measure of intervener's recovery. She was discharged from her employment at the college on the thirtieth day of September. She
5 endeavored to obtain employment. She testified on that subject as follows: "I was unable to find employment for the remainder of the year. I could not secure a position. I wrote a number of letters, went to the state superintendent and county superintendent, and wrote to as many of my friends as I could find out that had means of employing any one in my line of work, and even tried to get other lines of work. It was just after all the public schools had been in session a short time; so it was impossible to get a position. After making all these efforts, I was unable to find employment; and, after failing in this, I tried to start a school, but it was not financially successful, and did not pay expenses. The operation of that school resulted in a loss, although I used every effort within my power to make it a success." There is no evidence in conflict with her testimony. The school which she organized was put in operation some eight or ten days after she was discharged. The district court awarded her a sum equal to what her salary was at the college, until she started her school. We do not understand why her right to compensation was thus limited. The law appears to be well settled, that where an employe is discharged without cause, before the end of the contract of service, and is unable to find other employment, he is entitled to recover the contract price for the time he was prevented, by the dis-

obtain, so as to make the damages as light as possible. *Muller v. Fern*, 35 Iowa, 420. See 2 Sedgwick, Damages, page 82; 2 Sutherland, Damages, section 693. Our conclusion is, that the intervener should have been allowed full compensation for the remainder of the school year.

III. This disposition of the case renders it unnecessary to determine a motion of appellant to tax the costs of an additional abstract to appellee. The case will be remanded to the district court, to enter up judgment for the proper amount, in accord with this opinion.—REVERSED.

STATE OF IOWA V. ISAAC CLARK, Appellant.

Construction of Indictment. An indictment charged that defendant made an assault upon his wife, and did then and there cut her
1 with a razor, "with felonious intent *then and there* to kill and murder her." *Held*, as battery is not essential to the crime charged, the allegation concerning it may be treated as surplusage, and so doing, it is clear that the phrase "then and there," *last used*, refers to the assault; and the indictment is a sufficient charge of assault to murder, under the statutory rule that the indictment shall enable a person of common understanding to know that said charge was intended.

Cross-Examination: RELEVANCY. The prosecutrix, in a prosecution of her husband for an assault upon her with intent to commit
3 murder, may not be asked, on cross-examination, as to whether or not she had stated to a certain person that she was going to marry the defendant for the purpose of getting him to build a house for her.

SAME. On trial of defendant for assault on his wife with a razor, with intent to kill, where defendant testified that for several hours
2 prior to the occurrence he had been drinking, and had no recollection as to the occurrence, or that he had a razor with him, it was proper cross-examination, for the purpose of impeachment, to ask him if, on the morning following the occurrence, he had stated to a third person that he had borrowed a razor which he used at the time of the assault.

Indorsement on Indictment: WITNESSES IN CONTRADICTION. It is not necessary that the name of a witness for the state, called merely
2 for the purpose of contradiction, should appear indorsed upon the indictment.

Appeal from Polk District Court.—HON. W. A. SPURRIER, Judge.

WEDNESDAY, DECEMBER 9, 1896.

THE defendant was indicted, tried, and convicted of an assault with intent to commit murder upon Emma Clark, and sentenced to ten years' imprisonment in the penitentiary. From this judgment the defendant appeals.—*Affirmed.*

Mackenzie & Dewey for appellant.

Milton Remley, attorney general, and *Jesse A. Miller* for the state.

GIVEN, J.—I. The first contention of appellant's counsel is that the indictment does not charge that the assault was with the intent to commit murder.

Omitting the words immaterial to this inquiry
1 from the charging part of the indictment, we have the charge, as follows: "The said Isaac Clark * * * then and there, with a razor, * * * then and there held in the hands of him, the said Isaac Clark. * * * wilfully, unlawfully, feloniously, and with malice aforethought, did make an assault in and upon the person and body of one Emma Clark, and did then and there wilfully and feloniously, with said razor, * * * cut, wound, and stab the said Emma Clark, * * * with a felonious intent then and there by said Isaac Clark to kill and murder her, the said Emma Clark." It is argued that the intent alleged relates to the battery, and not to the assault; but we do not think the indictment should be so construed.

We think it would be plain to "a person of common understanding" that it was intended to charge that the assault was with intent to commit murder. See Code, section 4305. The allegation that the battery was committed is not essential to the charge of an assault with intent to commit murder, and, if this allegation be omitted, as it may, then, clearly, the intent charged relates to the assault. We think the indictment is sufficient.

II. The defendant was examined as a witness in his own behalf, and testified at length concerning difficulties between him and his wife, Emma Clark, prior to the time this assault is alleged to have been made. He also testified that he had been drinking during the day preceding that evening, and disclaimed any recollection as to the occurrences that evening with
2 his wife. Upon cross-examination the state inquired of him at length, and without objection, as to the occurrences of that evening, in which he stated, among other things, as follows: That he did not remember of having a razor at all. "I remember of seeing her draw the razor after I clinched with her." The defendant was recalled for further cross-examination, and asked if, on the morning following the occurrences, and in the jail, he had stated, in the presence of a Mr. Moore, that he had borrowed a razor of a friend which he used on that occasion. The defendant objected, as not proper cross-examination, and now complains that his objection was overruled. We think it was proper cross-examination, as bearing upon the statement of the witness, in chief, that he did not recollect the occurrence of that evening, with his wife. It was also competent as laying the foundation for impeaching the defendant. Mr. Moore was called by the state for that purpose, and the defendant objected, because his name did not appear upon the indictment; but it was not necessary that it should so

appear, he being called for the purpose of contradictions only.

III. Mrs. Emma Clark was examined on behalf of the state, and asked, upon cross-examination, if she had stated to Mrs. Brady that she was about to marry

Clark for the purpose of getting him to build a
3 house for her. The state objected as incompetent, irrelevant, and immaterial, and not proper cross-examination. The objection was sustained, and of this appellant complains. We think the matter inquired about was not proper cross-examination, was immaterial to the issues in this case, and, therefore, the objection was properly sustained. We find no error in this record, prejudicial to the appellant, and the judgment of the district court is, therefore, **AFFIRMED.**

STATE OF IOWA V. G. A. BROWN, Appellant.

Evidence: FIXING TIME. The owner of stolen hogs may be asked, in
2 a prosecution for the larceny thereof, as to when he got back certain hogs other than those alleged to have been stolen, for the purpose of fixing the time when the hogs in question were missed.

Cross-Examination. The owner of stolen hogs who has testified on
1 his direct examination, in a prosecution for larceny of the hogs, as to missing them from his pen, of pasture, cannot be asked on cross-examination as to having trouble, or a personal encounter, with defendant, where, up to that time, no evidence has been introduced to connect defendant with the theft

NEEDLESS REPETITION: Duty of judge. It is the duty of the court,
5 in a fair and effective way, to prevent counsel from going into a matter on the cross-examination of a witness, which has already been covered, and the counsel is himself to blame if such action put him in a ridiculous position before the jury, to his client's prejudice.

CONTRADICTION. Where the owner of stolen goods testified that
3 they were worth a certain sum, he cannot be impeached by evidence that, in a suit to recover their value, he had placed a larger value on them.

CONVICTION OF FELONY: *Impeachment*. Under Code, section 3648, 4 providing that "a witness may be interrogated as to his previous conviction for a felony," a witness cannot be asked, on cross-examination, if he had been "arrested" for a felony.

Construction of Charge: REASONABLE DOUBT. A charge that defendant cannot be convicted unless the state has overcome the presumption of innocence, and has made out every material allegation of the indictment beyond all reasonable doubt, and that satisfactory proof is required, and that no mere preponderance of testimony will be sufficient to warrant a conviction, unless so strong as to remove all reasonable doubt of guilt, is not objectionable as authorizing a conviction on a "mere weight or preponderance" of evidence.

SAME. On trial for larceny, a charge as to the value of the property 7 taken, containing a recital. "If you find, from the evidence, that defendant did take and carry away the property referred to," is not objectionable, on the ground that there was evidence in the case as to other property aside from that mentioned in the indictment, where, from the remainder of the charge, it was clear that the words, "property referred to," meant the property referred to in the indictment.

Appeal from Pottawattamie District Court.—HON. N. W. MACY, Judge.

WEDNESDAY, DECEMBER 9, 1896.

INDICTMENT for larceny. Verdict of guilty, and a judgment, from which the defendant appealed.—*Affirmed*.

C. H. Converse for appellant.

Milton Remley, attorney general, and Jesse A. Miller for the state.

GRANGER, J.—I. The larceny charged was of eight hogs, on the twenty-fifth day of March, 1894. A great number of objections are presented or suggested as to the admission and exclusion of evidence. The objections are based on appellant's abstract. An amendment to the abstract by the state, which is

sustained by the transcript, and is to be taken as true, shows that the objections are largely based on misapprehensions of the record and the facts disclosed thereby. Most of the questions as to the evidence are, in no sense, argued, but, as we have said, only suggested; and, in view of the record, we may dispose of them in a general way, after a particular notice of two or three. The hogs charged to have been stolen were the property of one Hackett, and he was the first witness for the state. His direct testimony was as to the missing of the hogs from his pen or pasture.

1 On cross-examination, he was asked as to his having trouble, or a personal encounter, with the defendant, and, under objection that the question was immaterial, and not cross-examination, it was excluded. It is merely said, in argument, that the ruling "was error prejudicial to defendant." It was not cross-examination, for the reason that, in his direct testimony, he had in no way referred to the defendant as having taken the hogs. Had the evidence closed before the cross-examination in question commenced, there would not have been a word of evidence to implicate any one in the taking of the hogs, and hence the question, at the time of the ruling, was neither proper cross-examination nor material, and the ruling was not erroneous.

II. At the commencement of the examination of the same witness the following appears: "Have lived in Center township since 1884; farm; buy and sell stock. In 1894 my hogs were kept in pen. Had 98. Mr. Saunders, county attorney: Now, what do you say about any hogs being missing at any time during that month? A. Why, after the first six were got back, along about the last of March, we missed a few hogs, then commenced to count, and were eight short. Q. * * * What time in March was this that you missed them? A. Well, it was— Q. Now, wait; when

did you get those back that you spoke about? Converse: That is objected to as immaterial. (Overruled. Defendant excepts.) A. Why, we got *them* back about the 20th of March. Q. Now, when did you miss the eight hogs?" The answer to the last
2 question was, "Along about the 27th or 28th."

Complaint is made of the ruling permitting the witness to state when he got the six hogs back. The evidence was merely to fix the time that the eight hogs in question were missing. For that purpose it was proper, and there could have been no prejudice
3 from its admission. The same witness fixed the value of the eight hogs at eighty dollars. On cross-examination he was asked if he did not, in a suit commenced to recover their value, place the amount at one hundred and twenty dollars, and under objection, the question was excluded. There was no objection to his stating what he had said the value was, but only to his stating the amount he had claimed in a suit for their value. There was no error. The court was evidently governed by the thought that, in a suit for recovery, the amount claimed in the pleadings is not necessarily what is thought to be the actual value or damage; but, as the recovery cannot exceed the amount claimed, the claim is placed at a figure so great as to surely meet the evidence, without an attempt at accuracy. Such a license, in pleading, has something of recognition in our law, wherein it is provided that the verification of pleadings shall not apply to the amount claimed, except in actions founded on contract for the payment of money only. Code, section 2678. It is urged that defendant should have been permitted to show the difference between the amount testified to on this trial and that claimed in the suit for recovery, as a means of impeachment. but we think not, for the reasons we have stated.

III. One Edwin Bird seems to have been a confederate in the crime charged against defendant. He was a witness for the state, and the following appears in his cross-examination: "I am now living in the Avoca jail. Have been living there a little over two months. I am not engaged in any business. Have been working a little since last March. Worked for the defendant's father all last summer. Have been convicted of felony, and served a term in the penitentiary.

Q. Are you the same Edwin Bird that
4 was arrested for the burglary of John Rose's?

Saunders: That is objected to as incompetent, immaterial, and not proper cross-examination. (Sustained as incompetent.) Q. How many times have you told this same story, Edwin, that you are telling now? Saunders: That is objected to as immaterial. (Sustained. Defendant excepts.) Complaint is made of the rulings indicated. The rulings are right. The fact of being *arrested* for burglary was immaterial, unless there was a conviction; and, if that was sought, the statute prescribes how the fact may be shown, as follows: "A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." Code, section 3648. As to the question, how many times he had told the same story, we cannot imagine any bearing it could have, except to confuse the case with immaterial matters. The objections we have considered indicate the general character of a great multitude of others presented as

again." One Puryear was also a witness for the state, and said: "I know Edwin Bird. Had a talk with him, about November 1st, in Oakland, about his testimony in this matter." The following then appears: "Q. What, if anything, do you remember hearing him say in reference to his motives, or purpose, in testifying against defendant, and with reference to his ability to swear a man into prison, or anything of that kind? Saunders: Objected to as incompetent and immaterial. (Sustained. Defendant excepts). The Court: That record has been made often enough now. (Defendant excepts). Q. What, if anything, did Edwin Bird say with reference to his interest in the case? Saunders: Same objections. (Sustained. Defendant excepts)." It is said, as to the remarks by the court, that they had the effect to place defendant's counsel in a ridiculous position before the jury, to the defendant's prejudice. The remarks were both respectful and true, and, if they had the effect claimed for them, which we do not think, the fault was elsewhere than with the court. When such conditions in a trial exist, it is the duty of the court to stop its progress in a fair, yet effective, way; and that, it seems to us, is what was done in this case.

V. Some complaints are made as to the instructions, and we notice some of them. The following is the second: "(2) The defendant, in the first instance, is presumed to be innocent of the offense charged until he is proven guilty according to the forms of law. His plea of 'not guilty' puts in issue every material allegation of the indictment, and he cannot be rightfully convicted unless the state, by the evidence, has overcome the presumption of innocence in defendant's favor, and has made out every material allegation of the indictment to your satisfaction, and beyond all reasonable doubt. Clear and satisfactory

proof is required. No mere weight or preponderance of testimony will be sufficient to warrant a conviction herein, unless it be so strong and convincing as to remove from your minds all reasonable doubt of the defendant's guilt." The instruction is said to be erroneous because of the expression, "mere weight or preponderance of evidence." And it is said that the jury might infer that, under certain circumstances, a mere weight or preponderance" would justify a conviction. The logical conclusion from the argument is, that the jury might infer that the court meant just the opposite of what it said, for in plain terms the instruction forbids a conviction upon a weight or preponderance of evidence not strong enough to exclude all reasonable doubt of guilt. The thought of counsel, likely, is, that no mere weight or preponderance is ever strong enough to exclude such doubt; but it is not so stated in argument. The instruction is not open to a meaning other than that the weight or preponderance must be sufficient to exclude all reasonable doubt. The jury doubtless so understood it.

VI. In the ninth instruction the court said: "If you find, from the evidence, that the defendant did take and carry away the property referred to," and it added sufficient facts to complete the offense, and then directed the jury as to finding the value of the property. Complaint is made of the use of the words "referred to," because the evidence refers to other property than that specified in the indictment, and it is thought that the instructions should have, in some way, limited the rule of the instructions to the property specified in the indictment. Of course, there could be no legal conviction for taking other property, and we think there is no failure in the instructions to properly so limit the action of the jury. The instructions commence with a statement of the substance of the indictment, in

which the property is described, and then, throughout the instructions, the words "property referred to," are used in a way to leave no doubt that they mean the property mentioned in the instructions and indictment.

The questions we have considered are as doubtful ones as the record presents, and we will not consider others. The evidence sustains the verdict, and there is no error that should disturb the judgment.—**AFFIRMED.**

STATE OF IOWA V. W. B. WADDLE, Appellant.

100 57/
130 83/

Inciting Perjury: AMOUNT OF PROOF. The rule that obtains in a

- 1 prosecution for perjury, that the falsity of the testimony must be established by two witnesses, or the testimony of one, supported by corroborating and independent circumstances equivalent in weight to the testimony of a single witness, does not apply in a prosecution under the Code, section 8938, making it a crime to incite or procure another to commit perjury though no perjury be committed.

SAME Nor is it essential that a case shall be pending when the false
2 oath is incited.

INSTRUCTING AS TO STATUTE OF LIMITATIONS. An instruction

- 3 directing a jury in a criminal case to inquire whether defendant had committed the crime at any time within the three years prior fixed by the statute of limitations, is not erroneous, although the facts limited the inquiry to a much less time.

Criminal Law: NEW TRIAL. A new trial will not be granted in a

- 4 criminal case for newly discovered evidence; especially where the evidence in question is, merely, cumulative.

Appeal from Wapello District Court.—HON. W. D. TISDALE, Judge.

WEDNESDAY, DECEMBER 9, 1896.

THE defendant was indicted for the crime of endeavoring to incite, or procure, another to commit perjury. The charge is as follows: "That said W. B.

Waddle, on or about the sixth day of June, in the year of our Lord, one thousand eight hundred and ninety-three, in the county aforesaid, and state of Iowa, and on divers other times and days, did unlawfully and feloniously, intending to pervert the due course of law, did corruptly and maliciously incite, instigate, and endeavor to persuade and procure one Lizzie Seadore to charge and prosecute one David R. Watts, in the court of the state of Iowa, having jurisdiction to try and determine the same (the particular name of said charge, or proceeding, and court, or courts, is to the grand jury unknown), of the charge of being father of a certain illegitimate child, to which the said Lizzie Seadore had given birth, she being an unmarried woman, and not the wife of the said David R. Watts, in which procedure, or prosecution, the oath of affirmative of the said Lizzie Seadore was and is required by law. The said W. B. Waddle, then and there, well and truly knowing that the said David R. Watts, was and is not the father of said illegitimate child, and that said charge was and is untrue, and the said W. B. Waddle then and there well understood and knew that the said Lizzie Seadore then and there knew that said David R. Watts was and is not the father of said child, and that said charge was and is false and untrue, and the said W. B. Waddle did then and there unlawfully, feloniously, corruptly, and maliciously solicit, suborn, incite, instigate, and endeavor to procure and persuade the said Lizzie Seadore to appear in court and prosecute said David R. Watts on said charge, as aforesaid, and to make oath or affirmation in such proceeding and trial that the said David R. Watts was and is the father of said illegitimate child, as aforesaid, the same being a material and relevant matter to the issue therein, and thereby, then and there, to put in issue, that the said W. B. Waddle knew that such testimony

was and is false and untrue, and then and there well understood and knew that the said Lizzie Seadore then and there knew such testimony was and would be false and untrue, contrary to, and in violation of law." Defendant pleaded not guilty, and the case was tried to a jury, and a verdict of guilty returned. Judgment of fine and imprisonment in the county jail was entered on the verdict. Defendant appeals. —*Affirmed.*

Jaques & Jaques and Seneca Cornell for appellant.

Milton Remley, attorney general, and Jesse A. Miller for the state.

GIVEN, J.—I. The first contention is as to a rule of evidence. Section 3936, of the Code, defines the crime of perjury. Section 3937, provides: "If any person procure another to commit perjury, he is guilty of subornation of perjury." And section 3938, under which this indictment is found, provides: "If any person endeavor to incite or procure another to commit perjury, though no perjury be committed, he shall be punished," etc. Perjury is manifestly an
1 element in each of these offenses. In the first two it is perjury committed, and in the last perjury endeavored to be procured to be committed. Appellant contends that it is incumbent on the state, in this prosecution, to prove that, if Lizzie Seadore had sworn that David R. Watts was the father of her child, it would have been false, by the testimony of two witnesses, or by the testimony of one supported by corroborating and independent circumstances, equivalent in weight to the testimony of a single witness. Appellee's counsel do not question the correctness of this rule as applied to prosecutions for perjury, but contend that it is not applicable to cases

like this. They do not deny that the burden is on the state to show that it is not true that David R. Watts was the father of Lizzie Seadore's child, but contend that this may be done by the evidence of one witness. The reason for the rule in proving perjury is, that "the unsupported evidence of one witness would be simply one oath against another." 18 Am. & Eng. Enc. Law, 323. It must be remembered, however, that in this case there is not one oath against another. Neither Lizzie Seadore nor any other person has ever made oath that Watts is the father of the child. If Lizzie Seadore had so sworn, by the procurement of the defendant, then the prosecution must have been under section 3937, and the rule would apply, for then there would be one oath against another. When there is only one oath against another, it is as though there was no proof, and therefore, to establish perjury, there must be the evidence of another witness, or its equivalent. The reason for the rule fails, when applied to a case like this, where the crime is complete, "though no perjury be committed." It seems to us clear, upon a reason and principle, that in cases like this the state may sufficiently establish the falsity of the matter charged to be false, by the testimony of one witness. Of course, as in all cases, the credit and weight to be given to the witness must be left with the jury. Of the authorities cited, some relate to familiar and undisputed principles of the law, and others to other offenses, and are not applicable to this.

II. By his motion for a verdict and his motion for a new trial, both of which were overruled, appellant presents the question of the sufficiency of the evidence in certain particulars. It is urged in argument that it is not proven that, if Lizzie Seadore had sworn that David R. Watts was the father of her child, it would have been false; that the state failed to make any proof that defendant ever asked Lizzie

Seadore to swear as charged; that the state did not show that there was in fact a case pending. The
2 last claim is not well founded. If, to prosecute under section 3938, there must be a case pending, one who endeavored to incite or procure another to commit perjury in bringing a case, could not be prosecuted. We will not extend this opinion by setting out or discussing the evidence at length, in considering its sufficiency in the two respects first mentioned. It must be conceded that much may be said in support of appellant's contentions in the two particulars under consideration, and this fact has led us to review the evidence with unusual care before reaching the conclusion we have. Appellant's first contention as to the evidence is based upon the claim that the evidence of more than one witness is required to prove the falsity of the oath which it was endeavored to procure Lizzie Seadore to take. We have seen that such is not the rule in this case, and, if it were, we think Lizzie Seadore is so far corroborated as to have warranted the jury in finding as it did. The evidence that defendant endeavored to procure Lizzie Seadore to charge on her oath that David R. Watts was the father of her child is clearly sufficient. The doubt in our minds is whether the defendant did not then believe that such was the fact. Lizzie Seadore, who had the best means of knowing the fact, testifies that she all the time told the defendant that one Walt Hoobler was the father of the child, and in this she is corroborated by her father. While upon some of these issues of fact we might reach a different conclusion, we cannot say that the jury was not warranted in finding as it did, or that the verdict is contrary to the evidence.

III. Appellant makes certain complaints as to the instructions, the first being grounded upon the claim that the testimony of two witnesses, or its

equivalent is required to show the falsity of the statement that Watts was the father of the child. The rule being as we have already stated, there was no error in not instructing on that subject.

The court, in instructing as to time, directed the jury to inquire whether defendant had committed the crime "at any time within three years prior to January 24, 1894," the date of finding the indictment.

3 While the facts limited the inquiry to a much less time, the instruction was according to the statute of limitations, and was not erroneous.

Appellant asked an instruction to the effect that, if the jury had a reasonable doubt as to whether defendant knew that Lizzie Seadore's illegitimate child was the child of David R. Watts, then they should acquit. This subject was fully covered by instructions given.

One ground of appellant's motion for a new trial was newly discovered evidence. The statute makes no provision for a new trial on this ground in
4 criminal cases; but, if it did, a new trial should not be granted, because the newly discovered evidence is merely cumulative.

Several complaints are made on account of rulings in taking the evidence. We will not consider them in detail. It is sufficient to say that we have examined each complaint with care, in the light of the record, and do not find that there was any error prejudicial to the appellant in the rulings complained of.

Our conclusion upon the entire record is that the

STATE OF IOWA V. TILMAN P. EDGERTON, Appellant.

Criminal Law: CHANGE OF VENUE: Discretion. On a motion for a change of venue, because of prejudice caused by newspaper

- 4 reports of the homicide, and the fact that the family of the deceased was influential, and was scattered over the county, it appeared that, though defendant was removed by the sheriff to another locality, on the death of the boy whom he shot, he was taken back in a few days to the place of the homicide, where he remained until the trial, which occurred over five months after the shooting and that the newspaper reports were in the main temperate, though some of them referred to mobs and lynching. The state secured a large number of affidavits showing that defendant could have a fair trial in that county. *Held*, that a refusal of the motion showed no abuse of discretion.

Defense to Murder: IMPROPER SURGERY. A person who inflicts a
5 dangerous wound from which death ensues, cannot defend a charge of murder on the ground that deceased might have recovered had he been treated according to the most approved surgical methods.

THEFT OF MELONS: Evidence. On the trial of one charged with
6 fatally shooting a boy whom he caught robbing his melon patch,
7 evidence that, previous to the robbery, certain burst melons were
9 found in the highway near the defendant's garden, cannot be received as explaining his presence in the patch at the time of the robbery, armed with a loaded revolver; there being no proof that defendant knew anything about these melons, or that they came from his premises; and stealing his melons would not justify the deadly use of a deadly weapon.

Instructions Construed Together: OFFENSES INVOLVED IN MURDER.

- 8 An instruction defining involuntary manslaughter is not erroneous because it fails to define voluntary manslaughter, if there are other instructions covering the omission.

Grand Jury Panel: SELECTION. Under Code, section 236, requiring

- 1 the county auditor to apportion the number of grand jurors to be selected from each election precinct, "as nearly as practicable in proportion to the number of votes polled therein at the last general election," it will not vitiate the panel that the auditor, finding an even division of the total vote by the right divisor would not yield the number of jurors required, added enough to supply the shortage to several precincts, indiscriminately, it appearing that

100	63
107	657
100	63
1115	99
100	63
128	19
100	63
129	263
130	22
100	63
140	661
100	63
144	376

no precinct had a less number of names apportioned it than it was entitled to.

EXEMPTION FROM JURY DUTY. The judges of election may return
2 for grand jurors persons over the age of sixty-five years under Code, section 234, requiring them to return seventy-five competent persons liable to serve as jurors, as the provision of section 228, exempting persons over sixty-five years of age from jury service, is personal and may be waived.

Advice of Court to Grand Jury. An indictment is not vitiated because
8 the court gave instructions relating to the law governing the crime charged, to *part* of the grand jurors, in the absence of the others, under a Code provision, that the grand jurors may at reasonable times ask the advice of the court; where all the jurors who so desired, received the instructions.

Appeal from Warren District Court.—HON. J. H. APPLGATE, Judge.

EDNESDAY, DECEMBER 9, 1896.

THE defendant was indicted for murder in the first degree, tried, found guilty of murder in the second degree, and appeals to this court.—*Affirmed.*

Powell & Ross for appellant.

Milton Remley, attorney general, *H. McNeil*, and *Jesse A. Miller* for the state.

DEEMER, J.—The county auditor, in apportioning the number of grand jurors to be selected at the general election held in the year 1893, selected seventy-five names from the different precincts in the county, giving to each precinct not less than two names,
1 and to some as many as eight. In one township, which cast one hundred and ninety-two votes at the general election in the year 1892, he apportioned three names, and in another, which cast one hundred and eighty-nine votes, he gave four, while in another casting two hundred and forty-seven votes, he apportioned five, and in another, which cast two

hundred and seventy-five votes, he gave four. This method of apportionment was made a ground of challenge to the panel of grand jurors made up from the list of names so apportioned, and is now complained of on this appeal. It appears that at the general election held in the year 1892, four thousand three hundred and seventy-eight votes were cast. The judges of election for the year 1893 were required to return seventy-five names. Dividing the total number of votes cast by seventy-five, and we have fifty-eight and a fraction as the number to be used in selecting the grand jurors to be returned from each precinct; for the statute at that time provided that "the county auditor shall apportion the number to be selected from each election precinct, as nearly as practicable in proportion to the number of votes polled therein at the last general election." Code, section 236. Turning again to the record, we find that no precinct had a less number of names apportioned it than should be given if we use the number fifty-eight as the divisor. But such an apportionment would not give the exact number required, and it is evident that the auditor added enough to the number thus found, to the precincts indiscriminately, to make the total of seventy-five. Now, we have frequently held that a substantial compliance with the law with reference to appointing, selecting, and drawing grand jurors is all that is required. *State v. Ansaleme*, 15 Iowa, 44; *State v. Knight*, 19 Iowa, 94; *State v. Brandt*, 41 Iowa, 593; *State v. Pierce*, 90 Iowa, 506 (58 N. W. Rep. 891); *State v. Adams*, 20 Iowa, 486. The statute we have quoted does not require an absolutely accurate apportionment. It says the auditor shall apportion them as nearly as practicable in proportion to the number of votes cast in each election precinct. It would be impossible to have an accurate apportionment, based upon the number of votes cast, for reasons which are

perfectly plain; and slight inaccuracies should not vitiate the panel. There was no such departure from the statutory methods in apportioning the grand jurors as to justify the defendant's challenge.

Another ground of challenge was, that a large number of persons returned by the judges of election for grand jurors, were over the age of sixty-five years, and were not, therefore, liable to serve as such.

2 The argument in support of this ground is, that the judges of election were required to select a list of persons competent and liable to serve as jurors, and that a person over the age of sixty-five years is not liable to serve. The provisions of our Code, with reference to this subject, are as follows: Section 234: “* * * Seventy-five persons to serve as grand jurors, * * * and composed of persons competent and liable to serve as jurors, shall annually be made in each county, from which to select jurors. * * *” Section 228: “The following persons are exempt from liability to act as jurors: * * * All persons * * * over sixty-five years of age.” Now, we have held that the exemption provided in the last section is a personal privilege, which may be waived, and that it is not a ground of challenge. *State v. Adams*, 20 Iowa, 486. The statute does not make such a person incompetent by reason of his age, and he is liable to serve, unless he claims his privilege, which is wholly personal to him. It follows, therefore, that the persons selected by the judges of election, who were over sixty-five years of age, were both competent and liable to serve as grand jurors, and that there is no foundation for this ground of challenge. The case of *State v. Adams*, is conclusive on this subject.

II. The grand jury which indicted the defendant was called to consider his case specially. After they had deliberated about the matter for some time without concluding as to the degree of crime for which they

should return a bill, some of the members of the panel asked the county attorney if they might consult the judge then presiding. They were informed that
3 they could, and some four or five members went before the judge, and received advice regarding the law of murder. No claim is made that the judge gave any instructions or directions to the jurors who appeared before him, except to explain the law applicable to the case. The complaint, as we understand it, is that the judge was in error in advising a part, and not the whole, of the grand jury; and that he had no right or authority to permit the grand jury to separate, and to advise a part, and not the whole, regarding the law of the case. It appears, however, that all the jurors who wanted any advice regarding the law of the case, went before the court while in session, and there received their information. Our Code provides that "the grand jury may at all reasonable times ask the advice of the * * * court." Code, section 4281. While this law no doubt contemplates that the grand jury, as a whole, should be present when the advice is given, yet we do not think that the procedure in this case was so irregular as to vitiate the indictment. No one contends that the judge did more than correctly expound the law relating to the crime of murder, and no possible prejudice could have resulted from his act.

III. The defendant filed a motion for change of venue, based upon prejudice of the people of Warren county against him, based upon certain newspaper publications of and concerning the shooting,
4 and upon the fact that the family of the deceased was old, influential, respectable, and was scattered over the county of Warren, and had so worked on public sentiment as to cause prejudice against him. It appears from the showing made in support of the motion, that on the day following

the death of the boy whom it is claimed the defendant shot, the sheriff of Warren county, after consulting with the defendant's attorney, and with the Honorable A. W. Wilkinson, who was then holding court in Warren county, concluded it was advisable to remove the defendant to Des Moines, which he accordingly did. He was kept at Des Moines for a short time only, and was then returned to Indianola, where he remained until the day of trial, which was begun on March 15, 1895, more than five months after the shooting occurred. The newspaper publications referred to, we cannot set out in full. It is sufficient to say that, as a whole, they are temperate in language, and, as a rule, contain nothing of an inflammatory nature. They are largely unembellished recitations of the facts as the editors were able to gather them, and in the comments upon the facts, the writers generally counseled moderation and respect for law. True, something is said in some of them of mobs and lynching and necktie parties, but these matters were referred to as mere rumors, and were put in some of the papers with the evident intent of making the articles sensational. There is no evidence that there was any talk of mob violence except the fact that the sheriff removed the prisoner to another county, and it is evident he soon became convinced there was no danger, for he returned the prisoner in a few days. Some of the newspapers complained of the removal of the defendant from the county because of the stigma it might cast upon the community. The state met the defendant's showing by a large number of counter affidavits, which clearly show, if the facts recited in them are to be accepted as true, that the defendant could have a fair trial in Warren county, uninfluenced by passion or prejudice. The case, in its facts, is not nearly as strong as appeared to be the recent case of *State v. Weems*, 96 Iowa, 426 (65 N. W.

Rep. 387), wherein we held that the court correctly overruled the motion to change the place of trial. We have many times held that we will not interfere with the discretion lodged in the district court in such matters, unless it appears that he improperly exercised or abused it. *State v. Weems, supra*; *State v. Foster*, 91 Iowa, 164 (59 N. W. Rep. 9); *State v. Helm*, 92 Iowa, 540 (61 N. W. Rep. 246); *State v. Williams*, 63 Iowa, 135 (18 N. W. Rep. 682). Such a showing is not made in this case, and we think defendant has no ground of complaint.

IV. Complaint is made of the rulings of the court in excluding certain expert and medical testimony, as well as some medical and surgical books, offered by the defendant, tending to show that by proper
5 treatment of the wounds of the deceased, his life might or could have been saved. The deceased was shot in the lower abdomen, and lived for nearly three weeks after he received his wound. It is not claimed that there was any negligence in the selection of a physician to treat him. But it is contended that if the physician called had resorted to the operation known as "laparotomy," his patient might have recovered, and it is this theory the defendant sought to prove by the evidence which was rejected. In this connection the court gave the following instructions: "You are instructed that if you find from the evidence that the defendant inflicted said wound or wounds upon the person of the said William J. H. Sandy, and that said wound or wounds inflicted by the defendant caused or contributed to the death of the said William J. H. Sandy, then the defendant cannot avoid the consequences of his act in so inflicting said wound or wounds upon the deceased on the grounds that said wounds were not treated according to the best and most approved methods of medical and surgical treatment for wounds of the character so

inflicted by him upon the person of the deceased. If you find from the evidence that the wounds upon the person of the said William J. H. Sandy, were in their nature mortal wounds, and that the said William J. H. Sandy died from the effects of the said wounds, and that they were inflicted upon the deceased by the defendant, then the defendant cannot avoid the consequences of his act in so inflicting said wounds upon the deceased, on the grounds that by some different treatment from what said wounds received, the life of said William J. H. Sandy might have been saved." This instruction evidently voices the thought of the court in his rulings upon the evidence, and we think the principle announced is the correct one. See *State v. Morphy*, 33 Iowa, 270, and *State v. Smith*, 73 Iowa, 41 (34 N. W. Rep. 597). These cases but announce a rule of the common law which has passed unchallenged for years. This rule, as stated by Bigelow, C. J., in the case of *Com. v. Hackett*, 2 Allen, 136, is as follows: "The well established rule of the common law would seem to be that, if the wound was a dangerous wound,—that is, calculated to endanger, or destroy, life,—and death ensued therefrom, it is sufficient proof of the offense of murder, or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered, if he had taken proper care of himself, or submitted to a surgical operation, or that unskillful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound." There is no question but that the wound in this case was a dangerous one. All the physicians so testified, and all the evidence shows that death resulted therefrom. It was no defense, then, for defendant to show that by more skillful treatment the deceased might have recovered.

Appellant insists, however, that the *Morphy Case*, before cited, is distinguishable for the reason that the instruction approved in that case required that the wound be given in malice. It is true that the latter part of the instruction there quoted does read as stated, but the instruction also says that, if the wound was so given, the defendant would be guilty of murder. The instruction relates not simply to the responsibility of the defendant, but also to the degree of his crime. The first paragraph of the instruction relates to the responsibility of defendant, and is in harmony with the one given by the court in this case, which relates to the responsibility of the defendant for the results of the wound inflicted by him. There was no error in the instruction, or in the rulings upon the evidence.

V. The defendant sought to show by witness Bledsoe that certain burst watermelons were found at a certain bridge in the public highway near defendant's melon patch, four days before the shooting, but the court would not permit him to do so. In order to understand the question here presented, it is necessary to refer to some of the facts disclosed by the evidence. The deceased, who was thirteen years of age at the time he was shot, was engaged with some other boys in robbing the defendant's melon patch, or had entered the same for the purpose of taking some melons. It appears that the defendant was concealed about the premises, and about the time the boys entered the patch he arose, commanded that they throw up their hands, and immediately commenced firing upon them with a revolver with which he was armed. The first shot struck the deceased, and as he turned to run he received another shot in the back. One of the claims made for the defendant is, that these or other boys, had frequently trespassed upon his ground, and stolen melons from

him, and that for that reason he armed himself for the purpose of defending his property. And in support of their claim of error in the ruling on the testimony of Bledsoe they say that his evidence tended to furnish a reason for the defendant's being in the melon patch, armed, at the time the boys went there. There are several answers to this claim. In the first place, there was no evidence to show that these melons, which were found at the bridge, came from defendant's land. In the next place, there is nothing to show that defendant ever saw these burst melons at the bridge, or that he knew anything about them. But, if these matters had been shown, it would be no excuse for the defendant. He would have no right, even under such circumstances, to use a deadly weapon to defend his property from trespass.

7 VI. The seventeenth instruction is complained of because it is said that it assumes the existence of certain facts which it is claimed were not in evidence. The portion complained of is as follows: "If you find from the evidence beyond a reasonable doubt that the defendant, believing that persons were in his melon patch, or were about to visit it, for the purpose of stealing his melons, started from Liberty Center, armed with a loaded revolver, to go to the place where his melon patch was located, and where the shooting occurred, with a wilful, deliberate, and premeditated intention and formed purpose and design, with malice aforethought, to kill any person who might be found in or who might visit said melon patch for the purpose of stealing his melons, and you further find that William J. H. Sandy was found in said melon patch by the defendant, and that the defendant with such intent, deliberation, premeditation, purpose, design, and malice, shot with said revolver the said William J. H. Sandy, and inflicted upon him a wound or wounds from which he thereafter died, then the

defendant is guilty of murder in the first degree, and you should so return your verdict." It is said that there is no evidence that defendant started from Liberty Center, armed with a loaded revolver, to go to the place where his melon patch was located, with a wilful design, etc. We cannot agree with counsel in this contention. It is true, there is no direct evidence to the point, but there is evidence from which the jury may very well have found these were the facts. It is not our custom to set out the evidence upon which we base our conclusions, and, if it were, it would serve no useful purpose, but would unduly extend this opinion. Our conclusion is that evidence on this point is all that is essential.

VII. In the nineteenth instruction the court correctly defined involuntary manslaughter. It is argued that the instruction is erroneous, because "it did not also define voluntary manslaughter. This contention would be sound if there were no other instructions covering the claimed omission. An examination of the record discloses the fact, however, that this matter was fully and clearly covered in the ninth, tenth, and thirteenth instructions, to which no exceptions were taken. It is elementary that the instructions must be taken and considered as a whole. It will not do to separate one from another, and say that one does not embody all the law upon a given proposition, and is therefore erroneous. If, as a whole, they fully and clearly and correctly cover the case, this is sufficient. We find no error in the instructions given.

We have not referred to the evidence at length, for the reason that no serious claim is made that it does not support the verdict returned; and there is no necessity now for stating more of it than we have already set out. It is sufficient to say that the verdict finds support in the evidence, and that there is no prejudicial error in the record. The sentence imposed

—twelve years in the penitentiary—was not a harsh one, and while the conduct of the boys in stealing melons was reprehensible, and aggravating to the defendant, yet it afforded him no excuse for the use of the deadly weapon in the manner he did. The judgment of the district court is **AFFIRMED**.

J. BUTTS, *et al.*, Appellants, v. MONONA COUNTY, *et al.*

Drainage: POWERS OF COUNTY BOARD. The board of county supervisors, in a proceeding for the establishment of a public ditch, under Acts Twentieth General Assembly, chapter 186, has jurisdiction to establish such drainage within the territory and through such lands as it deems proper, to effect the object of reclaiming the swamp and overflowed lands in the locality to be drained.

ESTABLISHMENT: *Substantially similar surveys.* A tax levied to cover the expenses of building a drainage ditch is not invalid because a change was made in the survey originally fixed upon by the supervisors, so that the survey, as accepted, did not occupy the line of the original, if it appears that the two surveys corresponded in length, and were on, substantially, the same line.

EVIDENCE TO SHOW REJECTION OF PETITION. The fact that the county supervisors rejected that portion of a petition made under Acts Twentieth General Assembly, chapter 186, which sought the issuance of bonds for payment of costs of drainage, does not show that they also rejected that portion of the petition which sought the establishment of the drain, or abandoned the proceedings to establish.

To show sufficient petition. The finding of the board of supervisors that a petition for the construction of a public ditch, had been signed by one hundred legal voters of the county, involving a finding that all the requirements of the law had been fully complied with, and the evidence furnished by the fact that the

100	74
117	47
117	51

100	74
128	433

100	74
137	90
137	113

to pay for the construction of such a ditch, where the tax was not levied until after the right to appeal had been given by subsequent legislation, although the proceedings for the establishment of the ditch were had before.

Appeal from Monona District Court.—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, DECEMBER 9, 1896.

THIS is a suit in equity to enjoin and restrain the collection of certain taxes levied upon the property of the plaintiffs to pay for the construction of a ditch. There was a decree dismissing the petition, and the plaintiffs appeal.—*Affirmed.*

S. H. Cochran for appellants.

Wright, Hubbard & Bevington and *McMillan & Kindall* for appellees.

ROTHROCK, C. J.—I. The plaintiffs seek to enjoin the collection of the tax in controversy upon several grounds set forth in the petition. Some of the defects complained of pertain to the jurisdiction of the board of supervisors to levy the tax. It is also charged that the orders made by the board originated and were carried out by fraud, and that the tax was levied for private gain, and not in the interest of the tax payers, and that the ditch for which the tax was levied is of no benefit to the lands of the plaintiffs.

The proceedings for the construction of the ditch were had under chapter 186 of the Acts of the Twentieth General Assembly. As it will be necessary to refer to that act further on in this opinion, we will here set out that part of it which appears to us
1 to be applicable to some of the questions presented by appellants. Section 2 of the act is in these words: "Whenever the petition of one hundred

legal voters of the county, setting forth that any body or district of land in said county, described by metes and bounds, or otherwise, is subject to overflow, or too wet for cultivation: and that in the opinion of petitioners the public health, convenience or welfare, will be promoted by draining or leveeing the same, and also a bond, conditioned as required by section 1208 of the Code, shall be filed with the county auditor, he shall appoint a competent engineer or commissioner, who shall proceed to examine said district of lands, and if he deem it advisable, to survey and locate such ditches, drains, levees, embankments and changes in the direction of water-courses as may be necessary for the reclamation of such lands or any part thereof, and he shall make substantially the same report, and the same proceedings shall be had as now provided by law for the location and construction of ditches, drains, and changes in water-courses, and two or more counties may unite in such work of reclamation in the manner now provided by law." Section 3 is as follows: "If the board of supervisors shall be of the opinion that the estimated cost of reclamation of such district of lands is greater than should be levied and collected in a single year from the lands benefited, they may determine what proportion of the same should be levied and collected in each year, and they may issue drainage bonds of the county, bearing not more than eight per cent. annual interest, and payable in the proportion and at the times when such taxes so apportioned will have been collected, and may devote the same at par to the payment of such work as it progresses, or may sell the same at not less than par, and devote the proceeds to such payment; and should the cost of such work exceed the estimate, a new apportionment of taxes may be made, and other bonds issued and used in like manner; but in no case shall any such bonds run longer than fifteen years, and at least ten per cent.

in amount of those issued on the first estimate shall be payable annually. The board of supervisors may divide the land to be benefited into drainage districts, which shall be accurately described and numbered, and such drainage bonds shall be in sums of not less than fifty dollars (\$50.00) each, and shall be numbered consecutively and issued as other county bonds are, and shall specify that they are drainage bonds, and designate by its number the drainage district on account of which they are issued. And in no case shall the amount of bonds issued exceed fifty per cent of the value of the lands in such drainage districts, as shown by the last assessment for taxation."

A petition, purporting to be signed by one hundred and fifteen legal voters of Monona county, was filed in the auditor's office on the fifth day of April,

1886. The following is a copy of the body of
2 the petition: "To the Honorable Board of

Supervisors of Monona County, Iowa: The undersigned respectfully represent that they are citizens and legal voters of said county; that all, or nearly all, of that part of Kennebec, Belvidere, and Sioux townships lying west of the Little Sioux river, and also a large portion of the east part of Franklin and Sherman townships, and of that portion of the east part of Ashton township west of the west fork, are subject to overflow, and too wet for cultivation; and that the public health, convenience, and welfare will, in the opinion of your petitioners, be promoted by draining, leveeing, and reclaiming the same. They therefore ask that a commissioner be appointed, as provided by law, to examine said district of land; locate such drains and other works as may be necessary and advisable for the reclamation of the same, or any part thereof; report accurately the boundaries of the district of lands to be reclaimed by the proposed works, and the lands benefited,

and such other matters as are deemed important or required by law. And your petitioners pray that, on the coming in of said report, such works of drainage and reclamation of said district of lands as are found necessary, or advisable, may be ordered; that the bonds of the drainage district may be issued to pay for the same, and the time for the payment of such bonds may be extended over as long a time as the law permits; and your petitioners will ever pray," etc. On the next day after the petition was filed, the county auditor appointed one Holbrook commissioner, as required by section 2 of the act above cited. The commission issued to Holbrook named the townships, and parts of townships, as they were designated in the petition, and directed him to examine the locality, and to "locate such ditches, drains, levees, and embankments through said lands, and make such changes in the direction of water courses, as may be necessary for the reclamation of such lands," and to return a plat and profile of such survey to the

3 auditor's office. The commissioner secured the services of a civil engineer named Wattles, and commenced the survey. A report was filed by the commissioner June 7, 1887. And afterwards, on the eighteenth day of June, 1888, what was denominated a "supplemental report" was filed, by which changes in the location of the ditch were recommended. This last report was approved, and the following record was made by the board of supervisors on the fifth day of September, 1888: "In the matter of the ditch known as the 'Wattles Ditch,' it appearing to the satisfaction of the board that all the requirements of the

in his report filed June 18, 1888, excepting the lateral ditch, or cut-off, on the east side of the Sioux river, in section 4, township 82, range 44, known as the 'Brown Cut-Off'; and the auditor is hereby ordered to procure and keep a drainage record, and record the papers in this case therein." Afterwards such proceedings were had that the lands thought to be benefited by the ditch so located were classified, and an equitable apportionment of the cost of the work was made, as provided by section 1214 of the Code; and the levy of the tax was made on the second day of October, 1889, and the auditor was directed by the board of supervisors to "carry the assessments of the benefits on the tax list for the year 1889."

This action was commenced on the twenty-ninth day of September, 1892, nearly three years after the tax was levied. It is said that the petition for a commission and survey did not contain the names of one hundred legal voters of the county, as
4 required by the statute above quoted. The names of one hundred and fifteen persons and firms were signed to the petition. Among these there are the names of four women. So far as the face of the petition shows, it was signed by one hundred and eleven men. Some evidence was introduced upon the question, and it is claimed in behalf of appellants that it appears by a preponderance of the evidence that the petition was not signed by one hundred legal voters. We do not believe that the position of counsel for appellants is well taken. It is true, one witness gave his opinion that there were one or two less than one hundred; but he designated no names, and his statement ought not to be regarded as evidence which would outweigh the finding of the board and the petition itself.

II. The main question, and that in which counsel for appellants appears to have the utmost confidence,

is that the original petition was rejected by the board of supervisors, and that they thereby lost jurisdiction of the subject-matter, and that the board had no power or authority thereafter to take further
5 action. This position of counsel is not sustained by the record of the board of supervisors. The only action taken by the board was to refuse to authorize the issuance of bonds to pay for ditching. This appears from the following proceedings, had on August 2, 1886: "On motion, the question of bonding the county for ditching purposes, was taken up; and, on motion that the county be not bonded for such purposes, Supervisors Riddle and Cron voted 'Aye,' and Supervisor McCaskey voted 'No.'" No action was taken by the board, to the effect that a proposition for some kind of a ditch to drain the territory named in the petition was rejected. It is urged that the petitioners so understood it, and the record is incumbered with testimony of witnesses to that effect. We cannot take the time or space to discuss such a question. No line of ditches was designated in the petition, neither as to length, breadth, depth, or location. That question was to be determined by the board upon the report of the commissioner. That part of the petition which asked that bonds be issued was rejected; and we think it is fair to say that not one of the petitioners had at any time any reason to believe that the matter of drainage asked for in the petition was at any time abandoned. It is true that some time elapsed before such a survey and location of the ditch was presented to the board for its approval. We have not

because the engineer who made the first survey was a man named "Wattles." It is contended that the tax is void, because the last survey was made by another engineer, and the ditch is not located on the
6 same line as the survey made by Wattles. The evidence shows that, so far as the two surveys corresponded in length, they were on substantially the same line. But this is not a matter of any consequence. It is a plain proposition, that ought not to be controverted, that the board had jurisdiction to establish such drainage within the territory, and through such land as it deemed proper to effect the object of reclaiming the swamp and overflowed lands in the locality to be drained.

IV. It is claimed that the ditch laws of the state were unconstitutional when this proceeding was had, on the ground that there was then no right to appeal from the order levying the tax. A right of
7 appeal was given. The proceeding as we have said, was commenced by the filing of the petition, on the fifth day of April, 1886; and, when the tax was levied, the plaintiff had the right of appeal. This question was determined by this court in *Yeomans v. Riddle*, 84 Iowa, 147 (50 N. W. Rep. 886).

V. The charges of fraud in procuring the ditch to be made and the tax to be levied, and that the contract was let for a sum largely in excess of the true value of the work, are not supported by the evidence. Other questions discussed in argument are not of sufficient importance to demand special consideration.

We have determined this case upon the questions as presented by counsel for appellants. It must not be understood that we hold that many of the objections urged to the validity of the tax, if well taken, in point of fact, are available to appellants in a suit in equity, to enjoin the collection of a tax, commenced

nearly three years after the tax was levied. We are satisfied from an examination of the whole record that the decree is right, and it is **AFFIRMED**.

STATE OF IOWA V. ALBERT MCKINSTRY, Appellant.

Larceny: SUFFICIENCY OF EVIDENCE. Evidence that the prosecuting witness, on the morning of the theft of his harness, found tracks leading from his barn to a place where a horse and cart had been hitched, and followed the tracks of the cart to within a short distance of defendant's home; that it rained just before the theft; that two tracks, evidently made by the same vehicle, were
1 plainly seen; that a cart was found standing in defendant's yard; and that the harness was found two days afterwards in a box which defendant was shipping to another state,—is sufficient to sustain a conviction, notwithstanding evidence tending to show an alibi and that defendant purchased the harness from third persons.

Practice: OBJECTION AFTER A VER. An objection to questions asked defendant's mother as to an alleged conversation with the
2 county attorney about fixing the papers so that defendant might escape, comes too late, after the defendant has answered.

Impeachment: ATTEMPT BY WITNESS TO BRIBE: Cross-examination. The fact that defendant's mother attempted to bribe the county attorney to fix the papers so that her son might escape, is
3 relevant, and may therefore be shown in contradiction of the testimony of the mother, brought out by the state on cross-examination.

Appeal from Washington District Court.—HON. A. R. DEWEY, Judge.

WEDNESDAY, DECEMBER 9, 1896.

THE defendant was convicted of the crime of larceny, sentenced to imprisonment for nine months in the county jail, and to pay a fine of one hundred dollars, and costs, and appeals.—*Affirmed*.

D. P. Stubbs and C. W. Coykendall for appellant.

Milton Remley, attorney general, *S. W. Brockhart*, county attorney, and *Jesse A. Miller* for the state.

KINNE, J.—I. The facts are, that a set of double harness the property of one C. B. Morgan, was, on the night of May 25, 1895, stolen from his barn; that it was found on the following Monday (May 27), in a box in the defendant's possession, among other goods, which defendant was loading into a car, preparatory to shipping it to the state of Kansas. When the officer went to make the arrest, the defendant attempted to run away, but this act appears to have been to avoid the service of an original notice in a damage case against him. The harness was taken on Saturday night, and after half past ten o'clock P. M. It was found to be missing the next morning, whereupon Morgan and
1 others began looking for tracks leading from the barn. It had rained the afternoon before the harness was taken, so that tracks could readily be seen. First, he found the tracks of a man, and after he had gone about sixty rods, he saw where a horse and cart had been hitched. He testified that "there is a road runs to where the cart appears to have been hitched. There the road turns and goes south a little bit, just where the cart was hitched. The cart had come down the main road, and went down by some willows,—right there. I could see that there was just two tracks coming and going east, seemed to have been made by the same cart. Can't tell which way the cart was going, but the horse. I could see that there had been one going each way. Just two tracks. One track up, and then back the same way. From there where the cart had been hitched, they went south forty rods, to the place marked 'Cart Hitched.' Then went due east pretty near three-fourths

of a mile, to the corner marked 'Horning.' The tracks then turned north one hundred and twenty rods, then east one-half mile. The cart followed along the road past the place marked 'Cyrus Dickenson'; went right by his house. From there pretty near a quarter down to Sec. 15, to the northwest. The track went across what is called 'McKay's Bridge.' It goes about eight rods due north again. There are two roads there. One went east by Mary Lury's. It turned at the corner of Sec. 4. Andy Myers owns the land. It then turned east at the corner of the section line. It then runs north, and follows up by the church. At the church, I got bothered by some tracks there, and stopped to examine the track. I passed some parties after I stopped there, trying to get on the right track. One of them was an old gentleman, by the name of Churchill. I kept the same track, and followed it north to the next corner, and then turned east. At the corner of the land marked 'J. B. McCaleb,' the track continued to McCaleb's corner. Then the track took right east on that road. I followed east from McCaleb's corner three-fourths of a mile. I then turned round, and went back. The tracks of the horse and cart were plain. They were plain in all of the road, with the exception of this last road. This road was not traveled much, and they took along the north side of the road, between a little patch of hazel brush and the fence. There had been no other cart along there. There was a short distance there had been a spring wagon, and there, at that place, it was only a short distance, and didn't amount to much. That was all the tracks there was on the road that morning until after I went along. Right along there by Mary Lury's I saw tracks of a man. There were tracks there where the cart had backed and forwarded; then went ahead. I took it to be the same track. There was no one with me when I was

doing this tracking, part of the way. My brother and hired hand were with me at the start. Some person was with me after they left." A cart was found standing in the yard at the farm of the defendant's father, which was about ten miles from Morgan's place. Defendant was at the time living at his father's home. There was some evidence that the shoe track seen by Morgan and others corresponded in length to the length of the defendant's shoe. The cart appears to have been traced to within a quarter of a mile of the defendant's place of residence. A light rig was heard to pass along the road about one o'clock A. M. of the night the harness was stolen, going in the direction of the defendant's residence. The person in the cart seems to have got out about half way between Morgan's and the place where the defendant resided, and shoe tracks were found there like those at Morgan's place. Such are, in substance, the facts established by the state. The defendant introduced evidence which tended to show that there was only one track over a part of the road; that the cart at defendant's father's place had not been moved or used for several days prior to the night on which the harness was taken; that there were no horses at the father's place with two shoes on; that a fruit-tree man had been over the road in a cart on the evening of the twenty-fifth. The defendant was a witness, and, in explanation of his possession of the stolen property, says that about one o'clock on the twenty-sixth (Sunday), he started with his team and wagon to his father's other farm, and that on the way he met a team and two men who had the harness, and bought it of them; he had never seen them before, and did not know them. He had a box in his wagon, with some old harness in it. This he emptied, and put the harness in controversy into the box, nailed it up, put a wire around it, and went on. One Churchill claims to have seen these

men some time prior to the alleged purchase of the harness, and to have examined the harness, and swears it was the same harness afterwards found in the defendant's possession. Another party claims to have seen these strangers on the road. The defendant shows by his own evidence, by his mother, father, and the hired man, that he was home at ten o'clock that night, and slept there until morning. All of them save the defendant testify that they do not know that he was out of the house during the night, and think he was not out. The state showed by a witness that he saw the defendant pass his house on Sunday; that soon thereafter he went over the same road the defendant traveled; that he did not see the defendant or the strangers of whom it is alleged the harness was purchased.

The foregoing is the substance of the more important facts developed upon the trial. It is said the evidence did not warrant the conviction of the defendant. If the defendant's witnesses are to be believed, he is an innocent man. There are, however, many facts in evidence which warranted the jury in disregarding much of the evidence adduced for the defendant as unworthy of credit. It is evident that the jury must have disregarded the evidence relating to the alibi as being untrue. It appears to us that, in the light of all the evidence, they were justified in so doing. Indeed, much of the defendant's evidence is of a doubtful character, and some of it is in contradiction of facts which are established beyond controversy.

II. An objection to the questions asked defendant's mother relating to an alleged conversation with the county attorney about fixing the papers
2 in this case, so that her son might escape, is said to have been erroneously overruled. The objection was made after the witness had answered

and was too late. *State v. Moore*, 25 Iowa, 128; *State v. Bengé*, 61 Iowa, 658 (17 N. W. Rep. 100).

III. The county attorney was permitted, over the defendant's objection, to testify that defendant's mother attempted to bribe him, and induce him to so fix the papers that her son might get out. The objection was that the evidence was irrelevant and incompetent, and that the state is bound by the evidence of the mother, and cannot contradict it as to irrelevant matter called out by it. It may be conceded to be the general rule that, if a witness is cross-examined on a matter collateral to the issue, his answer cannot thereafter be contradicted by the one drawing out such collateral matter. *Swanson v. French*, 92 Iowa, 695 (61 N. W. Rep. 407). The matter inquired about in this case, and as to which it was sought to contradict the mother of defendant, was not irrelevant or immaterial. Surely, it is competent to show, under such circumstances, that the witness had virtually attempted to bribe the prosecuting officer, and thus to interfere with the due administration of the criminal law, and such fact may be shown in contradiction of the testimony of the witness, drawn out by the state in cross examination. It is said in *Bradner on Evidence* (page 20, chapter 2, section 18): "It is not collateral, but relevant to the main issue, to inquire into the motives of a witness; and a party who examines him in regard to them is not bound by his answers, but may contradict them." *State v. Patterson*, 2 Ired. 346; *Morgan v. Frees*, 15 Barb. 352; *Newcomb v. State*, 37 Miss. 383; *Atwood v. Welton*, 7 Conn. 66; *People v. Austin*, 1 Parker, Cr. R. 154.

IV. Complaint is made of the refusal of the court to give certain instructions asked by the defendant, and of certain rulings made touching the admission of evidence, and of remarks made by the court in ruling upon an objection made. These, and all other

questions raised, we have carefully examined. There was no error. The questions referred to are not so important as to demand detailed consideration. The motion to strike appellee's additional abstract is overruled. The judgment below is **AFFIRMED**.

JOHN SHERMAN AND GEORGE C. SIMS V. THE CITY OF DES MOINES, JOHN MACVICAR, Mayor, E. W. CRELLIN AND C. D. BOARDMAN, Appellants.

Construction of Statute: TERM OF OFFICE. Acts Twenty-second General Assembly, chapter 1, provides, that in every city containing

- 1 thirty thousand inhabitants, a board of public works shall be
- 2 established, consisting of two members, to be appointed by the
- 3 mayor, one for a term of two, and the other for a term of three
- 5 years, to hold office until their successors are duly appointed and qualified; that their successors shall be appointed for three years; and that the mayor shall fill all "vacancies" in said board, by appointment. *Held*, that the terms of office began when the first appointments were made, and ended, one in three, and the other in two years, and the term of office of subsequent incumbents terminated every three years, dating, respectively, from the termination of the term of the office of the original incumbents.

SAME: Elective and appointive officers. Acts Twenty-third General Assembly (March 13, 1890), for the extension of the limits of certain cities, provides (section 5), for elections biennially of "all elective officers for terms and in manner provided by law for cities of the first class," that "said officers" shall qualify as provided by law, and that the terms of office of "all officers in office prior to said election, shall cease and determine upon the organization of the new city council so elected"; and, by section 6, all acts and

- 1 parts of acts inconsistent with it are repealed. *Held*, that the provision that the terms of office of "all officers in office prior to said election shall cease," etc., applies only to elective officers, and not to appointive officers, whose appointment is authorized by acts not inconsistent with it.

REPEAL BY IMPLICATION. Acts Twenty-second General Assembly, chapter 1, providing for the establishment of a board of public

100	88
116	172
100	88
128	696
100	88
135	616

- 6 extension of the limits of certain cities, (including those covered by previous acts), which provides for biennial elections on the first Monday in April, commencing in 1890, of elective officers.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

WEDNESDAY, DECEMBER 9, 1896.

MARCH 14, 1889, the office of the board of public works of the defendant city, was filled by the appointment of M. H. King, for the term of three years, and Martin Tuttle, for the term of two years. The city was organized under the annexation act in the spring of 1890, and on April 21, 1890, King and Tuttle relinquished the office. On the same day Robert S. Finkbine and R. L. Chase were appointed to said office, there being no designation as to the extent of their terms of office. They entered the office and held it until April 7, 1894, when Gen. Ed. Wright and John Sherman were appointed to succeed them, there being no designation as to their terms of office. Doubt having arisen in the mind of the then mayor, Isaac L. Hillis, as to the terms of office of their predecessors, he consulted counsel, who rendered an opinion, whereupon, on April 27, 1894, the said mayor re-appointed said parties, in a written communication to the council, wherein it was stated that General Wright had agreed that his term should expire on the third Monday of April, 1895, and that the term of John Sherman should be for three years, commencing with the third Monday in April, 1894. Wright and Sherman continued to hold the office until the death of the former, in December, 1895, when the mayor appointed the defendant, George C. Sims, in place of the deceased. The present mayor, who was elected in the spring of 1896, acting upon the assumption that the terms of office of both Sherman and Sims had expired.

proceeded to appoint C. D. Boardman and Edward W. Crellin, the appellants, as a board of public works. A controversy having arisen as to the right of possession to the said office, between the then incumbents and the new appointees, and the latter, as is alleged, threatening to take forcible possession of the same, plaintiffs filed a bill in equity and obtained an injunction preventing appellants from taking possession of said office. Such further proceedings were had that the parties entered into a written stipulation that the petition filed in that action should be considered as an information in *quo warranto*, and that, upon the issues made by said petition and the answer thereto, his honor, Judge Conrad, should determine the question of the right of the parties to said office, upon its merits, and enter judgment accordingly, the judgment to have the same force and effect as if rendered in a *quo warranto* proceeding. The case was heard by Judge Conrad, who decided that the incumbents and appellees, Sherman and Sims, were rightfully in the possession of the office, and the injunction was made permanent until the expiration of their terms of office. The defendants appeal.—*Affirmed*.

J. L. Myerly and Bishop, Bowen & Fleming for appellants Boardman and Crellin.

J. K. Macomber, city attorney, for appellants City of Des Moines and John MacVicar, mayor.

Cummins, Hewitt & Wright for appellees.

KINNE, J.—I. This record presents but a single question for our determination, and that is, whether the incumbents and appellees, or the appellants, Boardman and Crellin, are entitled to the office in controversy. The claims of the parties may be

summarized thus: The incumbents claim: *First.*

1 That the act creating the board of public works did not fix the time when the persons constituting such board should be appointed, or when their terms should expire; that no terms were created; that it provided that, when an appointment was made, it should be for three years, and until their successors were appointed; and, when a successor was appointed, either at the expiration of the three years or sooner, it must be for three years. *Second.* That the act of the legislature, known as the "Annexation Act," had no reference to the office or the officers of the board of public works, and in no manner affected the terms of office created in the original act. *Third.* If said annexation act did have reference to the board of public works, it affected the term of the officers of the board then in office, and in no manner referred to the term of office. Appellants Boardman and Crellin contend: *First.* That the act creating a board of public works also created fixed, definite terms of office; that by that act, one of the first appointees was to hold office for two years, and the other for three years, and, thereafter, each succeeding three years constituted a term of office. *Second.* That the annexation act terminated the terms of office of the board, and created new terms of the same duration as the old, and to commence with the third Monday of April, 1890, and at the expiration of each three years thereafter.

We shall not discuss all of these points of contention, but content ourselves with the consideration of the first two claims made by counsel for the incumbents, which, in view of the conclusion we have reached, will be decisive of the rights of these

2 contending parties. The following are the statutory provisions touching the matter under discussion: Chapter 1, section 1, of the Acts of the

Twenty-second General Assembly, provides: "There shall be established and created in every city of the first class, having a population according to any legally authorized census of more than thirty thousand inhabitants, a board of public works, which shall consist of two members, residents of such city, to be appointed by the mayor, by and with the approval of the city council, on or before the first Monday of April, 1889. One member shall be appointed for the term of two years, and the other for the term of three years, and they shall hold their office until their successors are duly appointed and qualified, and their successors shall be appointed in the manner hereinbefore provided, for the term of three years. The mayor shall fill all vacancies occurring in said board by and with the approval of the city council, but no member of the city council or city officer shall be appointed a member of said board." March 13, 1890 the Twenty-third General Assembly passed what is known as the "Annexation Act," which provided for the enlargement of the corporate limits of certain cities, Des Moines being the only city to which it could apply. The fifth section of said act reads: "In all cities affected by this act, the regular municipal election shall be held on the first Monday in April, in the year 1890, and in each alternate year thereafter. At such election there shall be elected all elective officers for such terms and in such manner as is now provided by law for cities of the first class. Said officers shall qualify within the time and in the manner now provided by law, and the terms of office of all officers in office, prior to said first election in all such cities or towns, shall cease and determine upon the organization of the new city council so elected." Section 6 of the act provides that "all acts and parts of acts inconsistent with this act are hereby repealed." There is not, nor could there well be, any contention with

regard to the length of the term of office of a member of the board of public works. It is three years. Did the act creating the board of public works create a fixed term? Most of the cases cited upon this question are based upon acts reading differently from our statute, and, hence, while to some extent elucidating the questions, are not of controlling importance. We shall not, therefore, give them special consideration. Upon this question the learned district judge said:

“The first question to determine is, did the act of the Twenty-second General Assembly create a term of office for the board of public works? It is well settled by the authorities that, where the law provides for the appointment of an officer to discharge certain duties, and that he shall continue for a certain period, and his successors shall be appointed for a like period, and does not fix definitely the time for the beginning and ending, then he holds from the date of appointment, or election, or qualification, and his successor, whenever appointed, will be appointed for a like time. This is well sustained by the authorities cited by counsel for the old board, Sherman and Sims. It is claimed for the old board that they come within this rule. It is true that the act does not fix any definite time for the appointment of these officers in the first instance, nor when they shall cease to act; but the act contains other provisions, from which I think it clear that it was the intention of the legislature to establish fixed terms of office, the terms to begin when the first appointments were made, and to end, one in three years, and the other in two years, from that time, and, thereafter, each term to be for three years. The provisions referred to, which seem to me decisive of this are, that for obvious and potent reasons it was provided that, after the terms of the first appointees, the succeeding terms should begin at different times, it evidently

being the intention of the legislature that there should be one remaining in office with the experience of one or two years; and the other provision which clearly points to the intent, is the provision that the mayor shall fill all vacancies occurring in said board. The statutes construed by the authorities cited by counsel for the old board contain no such provisions, nor their equivalent. In construing a statute, it is a rule of construction to give force and effect to every part of the statute, and in construing this statute, unless the intention was to create a definite term of office no force whatever can be given to the last sentence of said section, which is: "The mayor shall fill all vacancies occurring in said board by and with the approval of the city council," etc. There may be a vacant office, but there can be no 'vacancy' in office unless there is a term in which it may occur; and, unless it was intended that there should be definite terms, that language would have no force, for, without that, whenever an officer ceased for any reason to act, the appointment of his successor would be for the time prescribed for the first appointee. So I conclude that it was the intention of the legislature to establish definite terms of office for the board of public works, and therefore the first position assumed by counsel for the old board cannot be maintained. I think this view is well sustained by the authorities cited by counsel for the new board."

We fully concur in the opinion of the district judge upon this question.

II. What was the effect of the annexation act, heretofore quoted? Does the provision, "And the terms of office of all officers in office prior to said first election in all such cities or towns shall cease
4 and determine," apply to appointive as well as

creating the board and fixing the terms of office, so as to work the repeal of that part of the original act? It seems to us clear that the annexation act in no way affected appointive officers. It may be conceded that, reading the one provision last quoted alone, it is, in terms, broad enough to embrace all offices, whether elective or appointive. We think, however, that there are obvious and cogent reasons why it should not be given such a construction. To give it that meaning, is to effect a repeal of a portion of the act creating the board of public works. This cannot be done unless the prior act is in this respect inconsistent with the annexation act. It should require an exceedingly strong showing of inconsistency in the provisions of the two acts to warrant us in depriving the municipality of the benefit of one of the most prominent and controlling provisions of the original act. We refer to that provision which requires the first appointment to be made of one commissioner for two years and the other for three years. The purpose of that requirement is obvious. The duties devolved by law upon this board were important. They virtually had charge of all public improvements made by the city, and these involved the expenditure of large sums of money, and the exercise of discretion and judgment. It will admit of no discussion that if, at all times, one member of this board had had experience in the important work intrusted to that body, it would be of great benefit to his associate and to the municipality. We look at that provision of the law as very important, and it should not be abrogated or held to be repealed unless the necessity for doing so is imperative. If, then, the two acts may be properly construed so as to preserve this excellent feature of the original act, it is clearly our duty to reach that result.

Again, what was the primary and principal object sought to be attained by the legislature in the passage

of the annexation act? At the time that act was passed, the then city of Des Moines was surrounded by numerous municipal corporations immediately adjoining it. Indeed, they were a part of it in every way, except that each possessed its own municipal government. It was desirable, from every point of view, that these several municipalities should all be embraced within one municipal corporation. Such was the chief object of the law. Nor does it appear from the act itself, that any change in the existing status of the old city or its officers was sought or intended to be made, save what was absolutely necessary for the accomplishment of the perfection of the new or extended corporation. There was, then, no necessity, growing out of the proposed reorganization of the city, for the legislature to interfere with the provision of the prior law, which gave to the city at all times the benefit of the services of one member of the board who had had experience in the discharge of the duties of the office. We readily concede, that the fact that there was nothing in the situation at the time of the passage of the annexation act, requiring interference with the manifest intent of the prior act, that the terms of both members of the board should not expire at the same time, can have no force as against a subsequent positive enactment, changing or abrogating the law in that respect. Where, however, the intent to repeal the old act does not clearly appear from the language used, or is not a necessary deduction therefrom, or in case the language used in the latter act will, without violence, admit of a construction which will preserve intact a desirable provision of the original act creating the board, it is proper to consider carefully the objects sought to be obtained by the general assembly in the enactment of both laws, and the necessity, if any, for abrogating a valuable provision of the original act in

order to effectuate the later legislative intent. There is no inconsistency in the provisions of the two
6 acts. Turning to the section of the annexation act, it will be noticed that the only offices expressly mentioned there are elective offices. It provides that "at such election there shall be elected *all elective* officers for such terms and in such manner as now provided by law for cities of the first class." The next sentence is, "Said officers shall qualify within the time and in the manner now provided by law, and the terms of office of all officers in office prior to said first election in all such cities or towns shall cease and determined upon the organization of the new city council so elected." It is clear that every part of the section prior to the words "and the terms" refers to elective officers. After speaking of "elective officers," the very sentence which, it is claimed, terminated the terms of office of the board of public works starts out with the words, "said offices." There is no doubt that "said officers" referred to the "elective officers," before specifically mentioned in the same section. The last part of the section, we think, from its connection and punctuation, has the same meaning as if the word "said" had been inserted between the words "all" and the word "officers" in the third line from the bottom of the page. The most natural construction of the language used is that the words "and the terms of office of all officers," etc., refer to those offices, and those only, which had, in the prior part of the section, been especially designated.

Again, the section makes provision for the qualification of elective officers, but makes none as to appointive officers. If, therefore, appellant's construction be correct, and by this annexation act the terms of appointive officers are abolished, then so much of the original act as created the terms of office of the

board of public works, and provided as to the qualifications of those appointed to serve as members of said board, would be repealed, and there would now be no board of public works. It is not apprehended that the legislature intended such a result, nor does the language of the act so provide, either expressly or by implication. The second sentence and the first part of the third sentence in section 5, of the annexation act, re-creates the terms of office of elective officers, and provides as to the qualification of such officers, and clothes them with the same authority as such officers possessed prior to the passage of the annexation act. So it may be said that the latter words of the section, as to the "terms of office of all officers" ceasing and being determined, must refer to those officers, only, theretofore referred to in the same section, and should not be held to embrace other officers whose terms, qualifications, and duties are otherwise provided for.

The conclusion we have reached renders it unnecessary to consider other questions argued. It follows that the decree of the district court was correct, and that the appellants are not entitled to hold the offices in controversy. The decree below is **AFFIRMED**.

L. M. WALKER, Appellant, v. P. L. WALKER.

Amending Judgment on Appeal: CONSTRUCTION. Where it is uncertain whether a judgment for defendant disposed of and included a certain item pleaded by way of set-off, but it is inferable therefrom that it did not, and the judgment is excessive if it is not included, but as near as may be just if it is included, the judgment will be amended on appeal so as to be a bar to further recovery for such item.

ON RE-HEARING.—THURSDAY, DECEMBER 10, 1896.

Contracts: CONSTRUCTION. A son, who, under agreement with his father, goes into possession of his father's farm and personal property, and boards his father and mother, whose labor pay for their board, but pays no rent, is, on surrendering the farm, liable to account for the value of such personal property, and is entitled to compensation for permanent improvements made on the farm.

Appeal from Cedar District Court.—HON. J. D. GIFFIN,
Judge.

WEDNESDAY, MAY 22, 1895.

THE plaintiff is father to the defendant. Plaintiff owns, and has owned since prior to 1881, a farm, consisting of one hundred and sixty acres of land, on which he owned stock and farming implements. Plaintiff represents, that in 1881, he entered into an agreement with defendant, whereby he (defendant) was to live in the home on the farm with plaintiff and his wife, and work the farm, and that the entire proceeds of the farm were to be divided between them; that defendant took possession of the farm in pursuance of the agreement, and worked it till the commencement of this suit, in February, 1892; that defendant has wholly neglected to account to plaintiff for one-half of the proceeds of the farm, and has converted the same to his own use; that the value of the proceeds

from the farm for each of those years is not less than one thousand dollars, to one-half of which he is entitled. He further represents, that the stock on the place when defendant took possession, has been sold and used by the defendant, and that he is entitled, from the stock now on the place, to an amount equal in value to that on the place when defendant took possession. Plaintiff asks that defendant, by his answer, be required to state the amount he has received from the farm from year to year; that it be adjudged that plaintiff is the owner of the stock now on the farm to the amount of that taken by defendant, or the value thereof; that he be adjudged to be the owner of one-half of the stock in excess of that amount; and asks for general equitable relief. A receiver was appointed at the instance of plaintiff, who holds the property or its proceeds subject to the further orders of the court. The defendant admits having possession of the farm, but denies that it was in pursuance of an agreement to work the farm and divide the proceeds; and he says that the agreement was that he should have the use of the same without charge, except that he should keep and furnish a house for plaintiff and his wife, and should keep said place in repair and pay the taxes thereon, and with the further agreement that plaintiff would secure to defendant the title to said land, and make him secure in the improvements he should make thereon. Defendant then makes a showing that he expended for the support of plaintiff and wife, in board, clothes, and washing, the sum of three thousand two hundred and thirty-three dollars; for medicine, medical attendance, and personal services of defendant and wife in sickness, six hundred dollars; for hired help on the farm, seven thousand and ninety-four dollars; for defendant's personal services on the farm, four thousand three hundred and twenty dollars;

for money furnished to plaintiff, four hundred dollars; and for the crops from forty acres of land owned by defendant, which were used to feed stock on the farm, one hundred and forty dollars per year. Another suit between these parties has been, and is likely yet, pending, involving the title to the farm in question, which, in the district court, in the particular as to the title, was decided in favor of plaintiff, and in that particular, affirmed in this court. In that suit, in the district court, an allowance was made to the defendant of one thousand seven hundred dollars, for improvements on the farm, and a lien was established therefor on the land. That suit was decided in the district court before the issues were completed in this case; and in a part of the answer, "by way of counter-claim," the facts as to the entry of such decree and allowance are recited, with an averment that "plaintiff refuses to make any conveyance or other arrangements to pay or secure defendant for amounts expended for support of plaintiff and wife, and for their medicine, medical attendance, and money paid to them, or for improvements, repairs, and taxes made and paid on said land;" and judgment is asked for the amount in excess of the amount of the rental value of the land, in case no partnership is found. The partnership mentioned has reference to plaintiff's claim that the farm was to be worked and the proceeds divided. The district court found that there was no partnership, and, on a "general accounting," found that there was due plaintiff, from defendant, five hundred dollars. The plaintiff appealed.—*Modified and affirmed.*

Milton Remley and Wheeler & Moffit for appellant.

Wolf & Hanley, R. G. Cousins, and S. H. Fairall for appellee.

GRANGER, J.—It is agreed, in argument, that the court can no more than approximate justice in the case, because of the condition of the record as to evidence on which to base conclusions. Appellant claims that there is neither an issue nor evidence that will sustain a finding that defendant was, when he took the farm, to become the owner of the personal property thereon. It is true that the defendant

1 makes no such claim in his pleadings, and the testimony to that effect is remarkably slight.

From the judgment entry it is not easy, if possible, to know what the conclusion was in that respect. The aggregate of defendant's counter-claim is nearly twenty thousand dollars. Plaintiff concedes, in his pleading, that he has not data or information from which to know the amount to which he would be entitled under his claim as to occupancy, and hence he asks an accounting to show. The defendant asks, if the partnership is not found, that his counter-claim be established, and that he have judgment for any excess over the rental value of the farm. The partnership was specially found not to exist. The judgment evidently gives all the property on hand, or its proceeds in the hands of the receiver, to the defendant in the general accounting, and requires him to pay five hundred dollars. In the "decree and order" in this case, after the finding that "no partnership existed between plaintiff and defendant," is the following: "But after considering all the items of charges and claims made by plaintiff in his original petition, and the amendments thereto, and all the defenses and counter-claims made by defendant in his answer and the amendments thereto, the court finds that, on a general accounting of all such matters,

involves all the claims of both parties, and that, with proper credits on all such claims, five hundred dollars are due the plaintiff. If this judgment is in satisfaction of the claim for improvements on the farm, we are able to concur in the result, for it likely approximates, as nearly as can well be, a just result. If it does not include the claim for improvements, we could not concur, for the decree would be clearly unjust. The further judgment entry in this case gives rise to the doubt we have indicated. It is as follows: "And it is, therefore, finally ordered and adjudged and decreed, that the plaintiff have and recover of the defendant the said sum of five hundred dollars; that the injunction in this case be dissolved as to the one thousand seven hundred dollar judgment in favor of defendant against plaintiff, entered at the November term, 1892, of this court, in case No. 7,902; and that said injunction be made perpetual as to the disposition of personal property until this five hundred dollar judgment is satisfied, and, on the payment or satisfaction of the said five hundred dollar judgment in this case, the injunction as to said personal property is to be dissolved, and E. W. Atkins, the receiver, is then to turn over to the defendant all the property in his hands as receiver, and the receivership is then to terminate. It is further ordered and adjudged, that each party pay one-half the costs in this case. Judgment for costs accordingly."

The record leaves us somewhat in doubt as to the effect of this entry as to the injunction, and whether or not it is intended that the one thousand seven hundred dollar allowance in the other suit is to be collected. If so, then that claim has been twice adjudicated, and, with our conclusion in this case, twice allowed. On the other appeal, we reversed the district court on the allowance of the claim for improvements, but only because there was no issue to justify such an

allowance; and, to protect the rights of defendant, the reversal and judgment were without prejudice to the formation of issues in that case and their determination. The order in that case was after the appeal of this case, but before its submission to us, and without our knowledge of it. Because of this situation, unknown to the parties when this case was submitted, we are led to consider some matters not contemplated at the submission, but absolutely essential to a just conclusion, and properly within the record. Our conclusion is that the judgment should be affirmed as to the allowance of the five hundred dollars; and, because of the inference that the judgment below was not intended as a bar to a further recovery for improvements on the farm, it should be modified to that effect. This order is available to the parties in adjusting the other suit as to the same claim. Defendant will pay the costs of this appeal.—MODIFIED AND AFFIRMED.

SUPPLEMENTAL OPINION ON RE-HEARING.

Appeal from Cedar District Court.—HON. JAMES D. GIFFIN, Judge.

THURSDAY, DECEMBER 10, 1896.

THIS is a suit in equity, and it involves mutual claims of the parties, growing out of the use and occupation by the defendant of a farm and certain live stock and farming utensils and grain, which farm and personal property belonged to the plaintiff, and the possession of which was transferred to the defendant. There was a decree and judgment for the plaintiff for five hundred dollars, and he appeals.—*Reversed.*

Milton Remley and Wheeler & Moffitt for appellant.

T. B. Hanley and S. H. Fairall for appellee.

ROTHROCK, C. J.—I. This cause was submitted to this court at a former term, and on the twenty-second day of May, 1895, an opinion was filed in which the decree of the district court was modified and affirmed. Each party filed a petition for re-hearing, and a re-hearing was granted, and the cause has been again examined by the court, in the light of the arguments on re-hearing. As we have reached a different conclusion from that announced in the former submission, this opinion will be substituted for that heretofore filed.

The defendant is the plaintiff's son. The family consisted of the plaintiff and his wife and the defendant and one other son, named Joel Walker. The defendant was the younger son. The plaintiff settled on the farm, the possession of which is in controversy, in the year 1854. It consisted of one hundred and sixty acres, and was in full cultivation; and in the fall of the year 1881, the defendant and his wife were living with the father and mother, and all residing in the same dwelling house. At the time last named, an arrangement was made by which the defendant assumed the management of the farm, and the father and mother and the son and his wife lived on the farm as one family, until 1892, when a separation took place. As we understand it, there was a disagreement between the parties, and the contention in this case involves the adjustment and settlement of the rights of the parties growing out of the defendant's management of the farm. The plaintiff claimed in the petition filed in this case, that there was a contract by which the defendant was to carry on the farm, and the proceeds of the farming operations were to be equally divided between the parties; and he claimed that the live stock and probably other personal property on the farm remained his property,

and that defendant should account to him for the value thereof. In short, the claim of the plaintiff was that the farm and personal property at all times belonged to him, and that the son managed the farm for one-half of the proceeds, after taking out the support of the family. The defendant, by his answer, admitted that he took and held possession of the real and personal property. He denied that there was any agreement to manage the farm and divide the proceeds, but claimed that the contract was that he was to have the use of the farm without charge, except that he should keep and furnish a home for plaintiff and his wife, and should keep said place in repair, and pay the taxes thereon, and with the further agreement that plaintiff would secure to the defendant the title to the land, and make him compensation for the improvements he should make thereon. There were other allegations in the pleadings, and the evidence in the case took a very wide range, and the rental value of the farm, the value of the live stock, and the farm machinery and implements, and the value of the grain on hand in 1881, and the value of the boarding and clothing and medicines and medical attention for the father and mother, the improvements put upon the farm by the son, and many other things, were testified to by witnesses. A short time after the commencement of the suit, the district court appointed a receiver, who took possession of the personal property then on the farm, and holds the same or its proceeds, subject to the further orders of the court.

II. Whatever arrangement was made between the parties as to their rights growing out of the son's management of the farm, was purely oral. It was just such conversations and consultations as might be expected to take place between a son and his father,

son, Joel, had gone away from the home, and was taking care of himself. His father had aided him in making a start in life; to what extent does not clearly appear, and that is not material. But it is shown that the plaintiff desired to give the defendant an opportunity, by in some measure putting him on an equality with the other son, so far as providing him an equal opportunity to that of his brother. The district court found that the carrying on of the farm was not a joint or partnership enterprise, and we think that so far as the claim made by the plaintiff, that the net proceeds of the farm were to be equally divided, the finding is correct. But our re-examination of the record leads us to the conclusion that the defendant did not show, by a preponderance of the evidence, that the personal property was a gift to him from his father. It is true, as stated in the former opinion in the case, that under the evidence no exact finding can be made. It is impossible to do so. Both parties make most extravagant claims, and they are, in some sense, supported by the testimony of the parties and their wives, and others. The defendant claims a very large amount for improvements on the farm and other expenditures, such as the boarding of the father and mother, and medical attention, and other things. The testimony as to some of these claims is absolutely unworthy of belief, because it is contrary to the common judgment of mankind. The testimony of some of the witnesses on the other side is somewhat in the same line, but not quite so extravagant. We will not particularize. The whole tenor and scope of the controversy lead us to the conclusion that as near a fair and equitable adjustment as can be made under the evidence is that the defendant should be charged with the fair market value of the personal property which he took possession of when he commenced the management of the farm, and that no deduction should be

made therefrom except for permanent improvements, in the way of buildings. It is claimed in behalf of plaintiff, that the property on the farm in the fall of 1881, when the arrangement commenced, was worth six thousand dollars, or more. We think this is an extravagant claim. In averaging up the evidence, we think it approximates four thousand dollars. From this we deduct eight hundred dollars, for permanent improvements, leaving due to the plaintiff the sum of three thousand two hundred dollars. It appears to us that the defendant ought to be required to account for personal property about equal in value to that received by him in 1881, and that he ought to be allowed for permanent improvements, only. According to the evidence as to the rental value of the farm, he had an opportunity that he ought to have improved. There were no great expenditures. The services of the father and mother, in our opinion, ought to be sufficient compensation for their living; and we think the evidence so shows. The father had conveyed forty acres of land to the defendant before he took charge of the farm of one hundred and sixty acres. The son testified in part as follows: "My father is surety on a note to A. A. Ball & Co. for two thousand five hundred dollars, given in October, 1890, which has not been paid. I am indebted to Ball & Co. on a note for two thousand dollars; and I owe other parties five hundred dollars. I own forty acres, which I value at two thousand dollars; and, besides what I have on the place, I have nothing. The stock and property on the farm is valued at two thousand six hundred and fifty-three dollars." The forty-acre tract referred to by defendant is the land given him by his father.

III. There was another suit between the parties. On the second day of January, 1890, the plaintiff and his wife conveyed the farm to the defendant upon certain conditions. An action was commenced by the

plaintiff to set aside the conveyance, and there was a decree for the plaintiff. An appeal was taken to this court, and the decree was "affirmed." See *Walker v. Walker*, 93 Iowa, 643 (61 N. W. Rep. 930). The district court allowed the defendant one thousand seven hundred dollars, in that case, for improvements placed upon the farm after the conveyance was made to him. It was held by this court in that case that the judgment for improvements was not authorized by the pleadings. But we held that the defendant ought not to be precluded from presenting that claim, and the cause was remanded, with instructions to permit the pleadings "to be amended" in that action, if the parties should be so advised. There was some misapprehension about that claim for improvements when the former opinion was written in this case, and it is proper to say that we are not advised whether the claim has been adjudicated, and it is not intended by this opinion to determine any question in reference thereto. The controversy in this case has no reference to any improvements made on the land after January, 1890. The decree of the district court will be reversed, and the plaintiff will have judgment for three thousand two hundred dollars and the property and money in the hands of the receiver will be appropriated in payment of the judgment; defendant to pay the costs of this appeal.—REVERSED.

CELIA LARSON V. WILLIAMS & BETENBENDER, Appel- lants.

Setting Mechanic's Lien Judgment Aside: PERSONAL JUDGMENT ON DEFAULT: Notice. It appears that an unmarried man contracted for material to build a house, and, thereafter, married. A petition to foreclose was filed, husband and wife were made parties, notice was served on both that a personal judgment would be taken as to both, but the petition stated no fact authorizing such a judgment against the wife. One was, however, taken against her, on default, and counsel for plaintiff, knowing that the petition did not warrant it, drew and had signed a decree giving personal judgment against the wife. She did not discover this until it was too late to set the judgment aside, at law, under Code 3157. *Held*, there was no jurisdiction to render such personal judgment and it was proper to vacate the judgment against the wife, under Code 3154, which authorizes relief for irregularity in obtaining judgment, or fraud practiced by the successful party.

Equity: VACATION OF JUDGMENT. A court of equity has jurisdiction to set aside a judgment obtained by fraud, where the ground of relief was not discovered until after the expiration of the statutory time for setting it aside.

Appeal from Calhoun District Court.—HON. CHARLES D. GOLDSMITH, Judge.

MONDAY, MAY 27, 1895.

ACTION in equity, to cancel a certain judgment, and to restrain the enforcement thereof. Decree was entered in favor of the plaintiff. Defendants appeal.—*Affirmed.*

M. R. McCrary and *Brown McCrary* for appellants.

M. W. Beach for appellee.

GIVEN, C. J.—I. The judgment in question was rendered in the district court in and for Calhoun county on the seventeenth day of December, 1890, in

an action wherein these defendants were plaintiffs and Peter Larson and his wife, this plaintiff, were defendants. Plaintiffs in that action stated in their petition, as their cause of action, in substance, as follows: That on January 11, 1889, they entered into an oral contract "with the defendant to build a dwelling house" upon real estate described; that in pursuance of said contract they built said dwelling "for defendant," as specified in their statement for mechanic's lien; "that said defendant, at the time of the commencement of said building, was, and still is, the owner in fee simple of said land and said building;" that on the twenty-fourth day of April, 1889, they filed a statement for a mechanic's lien; that seventy-seven dollars remains due and unpaid, together with one dollar and fifty cents expense of said lien, after deducting all credits and three dollars for additional work. They ask judgment for the balance due, and decree establishing and enforcing their mechanic's lien. Their statement of mechanic's lien shows the oral contract "with Peter Larson"; that he was the owner of the land; that the house was built for Peter Larson; and that there was due from him, after allowing all credits, eighty dollars. The statement of accounts is against Peter Larson. The original notice in said case was addressed to "Peter Larson and wife, Celia Larson, defendants," and notified them that a petition would be filed, "claiming of you the sum of eighty-six dollars," enforcing a mechanic's lien against the real estate described, and that unless they should appear and defend "a default will be entered against you, and judgment rendered thereon." On December 17, 1890, said defendants, "Peter Larson and Mrs. Peter Larson making default, judgment was entered in favor of said plaintiffs against the defendants for the sum of eighty-five dollars and five cents," with interest. Decree was entered establishing and foreclosing said mechanic's

lien. On July 7, 1893, these defendants caused execution to issue upon said judgment against Peter Larson and this plaintiff, and caused a debtor of this plaintiff to be garnished, and thereupon, on February 9, 1894, plaintiff commenced this action.

Plaintiff alleges, as ground for setting aside said judgment, that at the time it was entered the court had no jurisdiction to enter a personal judgment against her, there being no allegation in the
2 petition showing any personal liability on her part. She further alleges, that said judgment was obtained against her by fraud practiced by the successful party and their attorney, in the manner stated. She states facts which would constitute a valid defense to said action against her, for a personal judgment. Upon the hearing of this action, the court found, that said judgment was rendered without jurisdiction to enter a personal judgment against this plaintiff; that at the time the labor was performed for which a lien was established, this plaintiff was not the wife of Peter Larson, and not a party to said contract; that said judgment, so far as it was personal against this plaintiff, was obtained by fraud practiced by the defendants and their attorney; and that plaintiff did not discover that a personal judgment had been rendered against her until more than a year after its rendition, by reason of the representations of the defendants and their attorney. The court found, "that the judgment ought to be modified to the extent that there be no personal judgment against her, but in no manner disturb the judgment against Peter Larson, or its effect upon the dower right of this plaintiff;" and decree was entered accordingly.

II. The finding of the district court that there was no allegation in the petition in the case in which said judgment was obtained, or evidence showing or tending to show, personal liability on the part of this

plaintiff, is fully sustained by the record before us. This action was upon the contract made with Peter Larson alone, and for a lien based upon the statement of account filed against Peter Larson alone. At the time the oral agreement was made, the house built, and the statement for lien filed, this plaintiff was not the wife of Peter Larson, and was as any other stranger to the transaction. She was a proper party to that action because of her marriage, but certainly not personally liable on the contract, and no one would understand from a reading of that petition that such a claim was made therein. There is considerable evidence as to why Peter Larson and his wife did not appear in that action. We are satisfied that she did not appear and defend against a personal judgment because of representations and assurances made to her by these defendants to the effect that there was no necessity for her doing so. These representations may have been made in good faith, for no reason appears why Mrs. Larson should have anticipated that a personal judgment would be rendered against her, nor had she had any defense as against any relief that might properly be asked against her under the petition. The wrong of this transaction was in taking personal judgment against her. M. R. McCrary, the attorney for these defendants, who took said judgment, when asked upon cross-examination why a personal judgment was taken against this plaintiff, answered, "Because I wanted a judgment against her." He further states that he based it on the fact that she had personal notice that personal judgment would be asked against her. We have no doubt, from the

their attorney, the plaintiff did not discover the existence of said judgment until about the time said execution was issued thereon.

Appellants contend that plaintiff's petition should be dismissed, because the action was not commenced within the time prescribed in the Code; citing *McCon-*
key v. Lamb, 71 Iowa, 636 (33 N. W. Rep. 146),

3 and other cases. In the case cited it is recognized that courts of equity have jurisdiction to grant relief against judgments where the ground of relief is not discovered, as in this case, until after the expiration of one year from the rendition of the judgment. We think the decree of the district court entered in this case is fully warranted by the facts, and it is **AFFIRMED**.

SUPPLEMENTAL OPINION ON RE-HEARING.

Appeal from Calhoun District Court.—HON. CHARLES
D. GOLDSMITH, Judge.

THURSDAY, DECEMBER 10, 1896.

THIS is an action in equity to cancel a certain judgment rendered in the district court of Calhoun county, Iowa, on December 17, 1890, in which action these
4 defendants were plaintiffs, and Peter Larson and his wife, this plaintiff, were defendants.

Plaintiffs, in that action, sought to foreclose a mechanic's lien against the defendants therein. They averred that they had entered into an oral contract with the "defendant" to build a dwelling house; that the house was built for the "defendant"; that "defendant" was the owner of the land and building situated thereon. They set out the filing of their statement for a lien, and asked judgment "against defendants," and the enforcement of their lien against the land

and building. The statement shows that the contract was made with Peter Larson, and that he owned the land on which the house was erected. The account was against Peter Larson alone. The original notice ran against "Peter Larson and wife, Celia Larson, defendants," and notified them that a petition would be filed "claiming of you the sum of \$86," with interest. It claimed the enforcement of a mechanic's lien against the real estate described, and that "unless you appear thereto and defend * * * a default will be entered against you, and judgment entered thereon." Both parties defendant having made default, a judgment was rendered against them as prayed, and a decree entered establishing and foreclosing the lien. July 7, 1893, the defendants herein caused an execution to issue on said judgment against Peter Larson and this plaintiff, and caused a debtor of this plaintiff to be garnished. February 9, 1893, this action was commenced by plaintiff. The grounds alleged for canceling the judgment, as against this plaintiff are—*First*, that the court had no jurisdiction to enter said judgment, there being no allegation in the petition showing any personal liability on part of Celia Larson; and *second*, that fraud was practiced by the successful parties and their attorney in obtaining the judgment. Facts are set forth in plaintiff's petition, which, if true, would constitute a complete defense to said action as against her. On the hearing, the court found that the judgment was rendered without jurisdiction as against said Celia Larson; that, at the time the labor was performed for which a lien was established, she was not the wife of Peter Larson, and not a party to said contract; that said judgment, in so far as it was personal against this plaintiff, was obtained by fraud practiced by the defendants and their attorney, and that plaintiff did not discover that a personal

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judgment had been rendered against her until more than a year after its rendition, by reason of the representations of defendants and their attorney. The personal judgment against plaintiff was set aside. Defendants appeal.—*Affirmed.*

M. R. & J. B. McCrary for appellants.

M. W. Beach for appellee.

KINNE, J.—I. This cause was heard in this court, and an opinion filed affirming the judgment of the lower court. A re-hearing has been granted, and the cause is again before us for determination. Without entering into a lengthy discussion of the facts, it may be said that there was nothing in the petition in the case of *Williams & Betenbender v. Peter and Celia Larson*, or in the issues involved in that case, to warrant a personal judgment as against Celia Larson. She was not a party to the contract out of which the lien arose. She was not the wife of Peter Larson when the contract was made, or when the labor was done for which a lien was thereafter established. The only reason for making her a party was that at the time the foreclosure suit was instituted, she was the wife of Peter Larson. No one, on reading the petition, would understand that any facts were pleaded which tended to show a personal liability on the part of Celia Larson.

II. The claim is that the original notice claimed a personal judgment against the plaintiff, and, as she made default in the action, she is now concluded by

of equity will grant new trials, in actions at law, after the time for applying for relief under section 3157 of the Code, has elapsed, if proper reasons are shown for not making such application within the time. *Bowen v. Mill Co.*, 31 Iowa, 464; *Partidge v. Harrow*, 27 Iowa, 97; *Hoskins v. Hattenback*, 14 Iowa, 314; *Young v. Tucker*, 39 Iowa, 596; *District Township of Newton v. White*, 42 Iowa, 613; *McConkey v. Lamb*, 71 Iowa, 638 (33 N. W. Rep. 146); *Lumpkin v. Snook*, 63 Iowa, 515 (19 N. W. Rep. 333). This action is not predicated upon the statute. It is an attempt to invoke the equitable powers of the court as to vacating judgments, on a proper showing, after the time fixed in the statute for so doing has expired. In the two cases last cited, it is held that the jurisdiction of a court of equity in such cases is limited to the granting of relief on the grounds

6 enumerated in section 3154 of the Code. Do the facts alleged and proven on the trial bring this case within the provisions of that section? Among the grounds enumerated in said section are the following: "For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order; * * * for fraud practiced by the successful party in obtaining the judgment or order." We think the facts alleged and established make these grounds applicable in this case. Here was a petition which contained no allegations authorizing a personal judgment against Celia Larson. Counsel taking the decree of the court knew such to be the fact. As a lawyer he knew that Celia Larson might confidently rely upon the fact that nothing was sought, as against her, save the extinguishment of her dower right in the premises. Having no defense to make to that claim, she was not called upon to appear and to answer to the petition. It matters not that the notice said that a personal judgment would be asked against her, as

she had a right to rely upon the fact that the petition contained no averment warranting such relief. It is claimed that, as the court by the notice had jurisdiction of the person of Celia Larson, and by law had jurisdiction in a proper case to render a personal judgment as to the subject-matter, therefore jurisdiction was in all respects complete, and, having failed to appear, she is concluded from now being heard. Such claim is not well founded. It is said in *Bosch v. Kassing*, 64 Iowa, 314 (20 N. W. Rep. 454): "It is true a defendant may be concluded by a default where the facts stated in the petition do not constitute a good cause of action in law, or where the petition is so defective as to be vulnerable to a demurrer; but where the petition omits the necessary averment to show liability against the defendant, the court may, and should, even upon default, refuse to enter judgment." Clearly, then, procuring the court to enter such a judgment, under the circumstances, was an "irregularity in obtaining a judgment," under the statute we are considering. So, also, procuring such a judgment upon a petition not containing any averment authorizing it, and with a full knowledge of the facts, was practicing a fraud within the meaning of the statute. In *Lumpkin v. Snook*, 63 Iowa, 518 (19 N. W. Rep. 333, 334), in construing this provision of the statute, this court said: "The term 'fraud' is used in this section in its ordinary sense, 'and it would involve any act or omission, or concealment which involves a breach of legal or equitable duty, trust or confidence, and is injurious to another, and by which an undue or uncon-

condition of his petition, such judgment would not have been rendered. Taking advantage of his position as an attorney, and of the confidence which the court no doubt reposed in him, he proceeded to procure a judgment which was wholly unwarranted. He thereby perpetrated a fraud upon the court and this plaintiff, to the injury of the plaintiff.

Counsel for the defendant herein was a witness in this case, and the following is a portion of his cross-examination: "Mrs. Larsen was made a party because I didn't know but the land was in her name, and I wanted judgment against both of them. Q. Then why was a personal judgment taken against her in the decree? A. Because I wanted a judgment against her. Q. It was not based on any fact, or any contract, or any liability on her part? A. I can't tell you whether it was or not. I don't know about any contract now.

I don't mean to say I didn't pay any attention
7 to that. I drew the decree in which judgment was rendered against her. Q. Now, in drawing that decree, upon what fact did you base it that you had a right to a decree against her? A. I based it on the fact that she had personal notice that we would ask for a personal judgment. Q. Did the notice state to her that you would ask for a personal judgment? A. The notice stated to her,—it's the best evidence,—that I would ask for a judgment against her. Q. As a matter of fact, there was nothing on the face of the petition to show that there was any liability on her part? A. Petition is the best evidence. Q. I would like to have you answer the question. Is there any

would be liable to any judgment? A. The petition is the best evidence. Let me have the petition, and I will read it. (Witness is handed petition). Q. Go on. I want you to state what there is in the petition that shows any liability on her part. A. Nothing more than the statements there made. Q. Then you didn't understand, at the time you drew the petition, that she had made a contract, or in any way made herself personally liable? A. I didn't investigate the matter. If the land was in her name I wanted a personal judgment against her. Q. If the land wasn't in her name, then what? A. I wanted it anyhow. Q. Whether she was liable, or not? A. I had served her with a notice that I was going to ask for it, and that is why I wanted it." From this

8 examination, it will be seen that the decree embracing the provisions for a personal judgment was prepared by counsel; that he knew that the petition contained no allegation authorizing a personal judgment against Celia Larson, yet he persisted in obtaining such a judgment. Not having reason to believe, from the allegations of the petition, that any personal judgment could be entered against her, she was not negligent in not defending against relief which could not be legally given under the
9 statements of the petition. She did not learn of the rendition of this judgment until long after the time to avail herself of the remedy provided by statute had passed. She then instituted this action to cancel the judgment.

We have not considered the question as to whether or not defendants herein or their counsel made statements to the plaintiff herein which were calculated to prevent her from making defense to the mechanic's lien suit. It is due counsel to say that, after a re-examination of the record, in the light of further arguments, we reach the conclusion that the

statements and representations made by defendants herein, or their counsel, to Celia Larson, if any, related to another case, which was tried months after the mechanic's lien suit. It seems to us, however, that the act of counsel in procuring this personal judgment against Celia Larson, when there was no foundation therefor in the petition, was such a fraud in law as should warrant the relief asked in this action, and that the decree of the district court was right.—**AFFIRMED.**

**WILLIAM BALLINGER AND A. J. MATHIAS, Executors, v.
EDWIN H. CONNABLE, Appellant.**

100	121
190	601
100	121
116	18

Construction of Will: ADVANCEMENTS. A father, after devising to his three sons equally, the residue of his estate, provided that, for purposes of distribution, the principal of all advancements, without interest, should be considered as part of the residue of the estate, in their hands, respectively, and that, in case of conveyances, the consideration named therein, or, if no consideration was named, the actual cash value at the time of distribution, should be treated as the amount of the advancement. The father, several years prior to his death, purchased for one of his sons a farm, and put him in possession, but retained title thereto in himself. This farm was allotted to the son in possession, by the executors. *Held*, that the actual cash value of the farm at the time of distribution should include the value of improvements made thereon by the son while in possession, by his own labor and by the expenditure of money charged against him in the settlement as advancements; and that such advancements, made by the conveyance of land, should be diminished, on distribution, by deducting said improvements; it not appearing that the father intended the value of the improvements to be credits against the advancements.

PERSONAL TRANSACTIONS WITH DECEDENT. Under Code, section 3639, prohibiting contracts and proceedings from distribution against an

Appeal from Lee District Court.—HON. A. J. McCRAEY,
Judge.

THURSDAY, DECEMBER 10, 1896.

THIS is an appeal from an order of the district court approving and confirming a report made by the plaintiffs as executors of the last will and testament of A. L. Connable, deceased. The order of the court was excepted to by Edwin H. Connable, one of the devisees named in the will, and he appeals.—*Affirmed.*

James H. Anderson for appellant.

James C. Davis for appellees.

ROTHROCK, C. J.—I. Albert L. Connable, the testator, died in the month of April, 1894. He left three sons surviving him, named Albert E. Connable, Howard L. Connable, and the appellant, E. H. Connable. On the thirty-first day of December, 1887, he executed his will, by which he bequeathed all of his property to his said sons; each one to have one-third of his estate after taking an account of certain
1 advancements made by him to them. That part of the will necessary to be considered in determining this appeal is as follows: "I desire that my estate shall be considered as including all advancements which I have heretofore made to each of my three sons, for the purpose of division, and that the principal amount advanced by me to each, without any interest thereon, be considered as part of my estate in their hands, respectively, whether the same be evidenced by note, book account by me, receipt or conveyance of real estate,—the consideration named

sum is named, the actual cash value of same at the time of division of the estate shall be considered its value. I recommend that my executors take into their counsels, in disposing of my estate, my friend Charles, P. Birge, who is cognizant of most of my business, and that they pay him fairly for any service he may render them in the settlement of the estate.

* * * I desire the contract between myself and Charles P. Birge be carried out by my executors as the same is made, and that a reasonable time be allowed to close up the matters which we have in connection together. After my debts are paid, and expenses of settlement of the estate and any bequest which I may make by codicil hereto are provided for, it is my desire that all my estate be divided equally, share and share alike, between my three sons, Albert E. Connable, Howard L. Connable, and Edwin H. Connable. The property may be divided in kind, the executors making such division and designating the part to each, having regard to the preferences or wishes of each, so as to give to each an equal share therein, making transfers of personal assets and conveyances of real estate, for which purpose the title to the real estate is hereby conferred to them of all the real estate of which I may die seized, their decision to be final." It is further provided in the will that the division of the property shall be made "with as little trouble as possible." And, as showing the confidence reposed in the executors by the testator, a codicil to the will is in these words: "I further will and direct that should my estate be put to any expense by any of the beneficiaries under this will contesting this will, that the amount of such expense, including attorney's fees which are rendered necessary to be paid by my executors in defending against such contests or suits, and that any expense which may be made to the estate in contesting any decision of my executors in making

division of my estate, in their discretion, shall be chargeable alone to the share given by the foregoing will to such devisees or beneficiary, and to such extent the devise to such beneficiary is charged hereby." A second codicil to the will is as follows: "This codicil, made by me, Albert L. Connable, to my last will and testament, as appears by the foregoing pages, for the purpose of adding to the provisions of said will the following bequest: I desire to set apart, in the hands of my said executors, to be charged to the share in the said will given to my son, Edwin H. Connable, fifty (50) shares of the capital stock of the Keokuk Savings Bank (shares \$100 each), for the benefit of my said son Edwin H. Connable, and to the heirs of his body. I direct my said executors to collect and pay to my said son during his life-time the dividends on the said stock as same may be declared after my death, same to be paid each time into his own hand, and no alienation or transfer of same shall be valid, whether said transfer, or alienation, be voluntary, or involuntary, on his part. And no anticipation in any manner of the receipt of such dividends shall be valid or binding, but same shall be paid to him personally, notwithstanding any attempt by him to transfer same. Should it be necessary at any time to change the investment, by reason of termination of the bank, or any other reason, my said executors shall re-invest the proceeds of said bank stock in some other interest or income bearing securities, which shall be held by my executors in the same manner as such bank stock during the life of my said son, Edwin H. Connable, remainder over to the heirs of his body, or, in case he shall have none, it shall become part of my estate, to be distributed as aforesaid." The will was duly

took an account of the advancements, and made a division of part of the property, and filed their report of the division made. This report is too voluminous to incorporate into an opinion. It is sufficient to state generally that, in making a division of the estate, the son named Albert E. Connable was found to have had advancements amounting to several thousand dollars, and he had received conveyances of land, including what was denominated as his "Home Farm," of two hundred and sixty-eight acres, in Hancock county, Ill. This farm was appraised by the executors at the sum of seventeen thousand five hundred dollars. Some bank stock was also set apart to him, so that the total value of property set apart to him amounted to twenty-eight thousand six hundred and fifty-six dollars. The advancement and division made to Howard L. Connable amounted to nineteen thousand three hundred and sixteen dollars. The following is a statement of the advancements made to Edwin H. Connable, the appellant herein:

TO EDWIN H. CONNABLE.

By book account.....	\$ 7,344 96
By notes, Exhibits 9, 10, 11, 12, 13 and 14..	3,018 02
By fifty shares Keokuk Savings Bank stock.	7,500 00
By E. hf. L. 6, B. 65, Keokuk, Iowa, Exhibit 15.....	9,000 00
By 578 acres land in Clark county, Mo., Exhibit 16.....	25,000 00
<hr/>	
Total advancements to Edwin H. Connable.....	\$51,862 98

These several sums are named in the report as

his death. The title of the farm of five hundred and seventy-eight acres, awarded to Edwin H. Connable, was held by the testator at the time of his death. It was purchased by the father for his son Edwin some twenty years before the death of the father, and was taken possession of by Edwin soon after the purchase, and he has made that farm his home since it was bought by his father. The will and the evidence show that the testator did not have confidence in the business management of this son. There is evidence in the case which shows that the father would not convey the farm to his son because of his dissipated habits and his mismanagement of the farm.

II. No objection was made to the report of the executors by any of the sons excepting Edwin. His exceptions were to the effect that the Missouri farm was greatly overvalued by the executors, and that he had placed large and valuable improvements upon the land with his labor and with the money which
2 his father advanced to him. He stated his exceptions to the report, so far as it fixed the value of the farm, as follows: "That this respondent, with the money which the executors have charged to him, evidenced by book accounts and notes, and with his own labor and earnings, has placed upon said farm improvements and betterments, by placing same in cultivation, ditching the low lands, so as to drain the same, and erection of fences and growing hedges, by erecting buildings, sheds, barns, waterworks, blacksmith shops, stables, cattle pens, scales, and other improvements, over and above his work on the stone house and large barn as aforesaid, he has placed improvements upon said land to the value of about eleven thousand dollars (\$11,000), as more fully appears by Exhibit A, hereto attached and made part hereof; and that said land, in consequence of said improvements so made and erected thereon by this respondent,

has been enhanced in value from the amount which was paid for the same by Albert L. Connable from the sum of ten thousand six hundred dollars (\$10,600), its cost to Albert L. Connable, his father, to the value the same now is, about seventeen thousand five hundred dollars,—there having been no material increase in the value of lands in that neighborhood aside from improvements; and that the difference in its value now, and when the same was purchased by his father, is due solely and alone to his own labor and expenditures which he himself has made from the advances so made to him by Albert L. Connable, and his own labor and results of the use of the farm; that substantially all of the improvements of the farm, outside of the amount paid by his father, for the erection of the house and large barn, were made by him, and it is unfair and improper that he should be charged with the advances so made to him by his father, and then again for the improvement to the land made with the proceeds of such advances." There were a number of witnesses examined as to the value of the farm. The district court determined, in effect, that twenty-five thousand dollars was not an over-valuation. We will not set out the testimony of the witnesses. We have carefully examined that question and we think the valuation was sustained by a fair preponderance of the evidence. It is true that a number of witnesses testified that the farm was not worth twenty-five thousand dollars; but, when cross-examined in reference to sales of other lands in the neighborhood, and when considered in connection with the testimony of other witnesses, to the effect that the valuation of the executors was fair and reasonable, that question ought to be regarded as rightly decided by the district court. It is proper to say, in this connection, that it does not appear that appellant, at any time during

the life of his father, or afterwards, accounted in any way for the use and occupation of the farm; and the executors made no charge against him for rent, except that, in estimating the value of the farm, they took into consideration the rental value from the time of the death of the testator until the filing of the report.

III. The principal question in the case arises upon the right of the appellant to reduce the charge against him for the value of the farm, by deducting therefrom certain labor performed and expenditures made, which he alleges were due to him from
§ his father for improvements upon the farm.

There is nothing in this whole record which in the least degree tends to show that the testator supposed that any of his sons had any claim upon him upon any account whatever. On the contrary, it appears that he held promissory notes, given to him by the appellant, in the sum of about three thousand dollars, and his book account against him amounted to more than seven thousand dollars. The will, by its express terms, directs that the estate devised shall be considered as including all of the advancements, without interest thereon, whether evidenced by note, book account, receipt, or conveyance of real estate. It is a most pertinent inquiry, whether the very language of the will does not exclude all claims of the devisees against their father, founded upon improvements made on the farms on which they lived, and of which no account was taken by the father during his life, either by mention in his will, or by credit upon his books of account, or by recognition in any other way. It may be that such a claim might be interposed and sustained if founded upon some legal obligation of the father to pay his sons for improvements on the farms which, it is conceded, he purchased for them.

IV. Appellant, on the hearing of his exceptions to the report of the executors, introduced himself as a witness; and he was asked the following questions by his counsel: "Who made the improvements on the land?" and "State to the court who paid Mr. Lowrie for the wind-mill and water works that he put on the place." Objections to these questions were sustained, on the ground that they tended to prove a personal transaction between the witness and his father. It was then proposed by counsel to prove by the testimony of appellant that he put these improvements on the farm and paid for them himself. An objection to the proposed testimony was sustained. Appellant excepted to these rulings of the court, and it is claimed in argument that they were erroneous. It is provided by section 3639 of the Code that "no party to any action or proceeding * * * shall be examined as a witness in regard to any personal transaction or communication between such witnesses and a person at the commencement of such examination, deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee or guardian of such insane person or lunatic. * * *" The hearing of the exceptions to the report of the executors was not the trial of an issue in an action in which the parties are named as plaintiffs and defendants. It was a proceeding in probate, where the party excepting to the report claimed rights adverse to the other devisees under the will. The statute being applicable to any legal proceeding which is adversary in its character, it applies to such a controversy as this. See *Neas v. Neas*, 61 Iowa, 641 (17 N. W. Rep. 30). It is well to consider what the question propounded to the appellant, and the testimony which it was proposed he should give, tended to prove. His previous examination as a witness, and his exceptions to the report show that he intended to testify that he

made and paid for the improvements for which he claims a credit in making up his share of the estate. As we have said, he is in precisely the same position as though he was making a claim against the estate for the improvements. If he had no legal claim against his father for them, he has no right to maintain them against his estate. The section of the statute above cited has many times been considered by this court. In *Peck v. McKean*, 45 Iowa, 18, it was held that, in a claim for personal services rendered to a person who afterwards died, the claimant was not a competent witness to show the work performed by the plaintiff for the deceased. It was said in that case that "the performance of labor by plaintiff, assent thereto, or other facts which would raise an implied promise of deceased to pay for it, would amount to a personal transaction between them." The cited case has been repeatedly followed and approved by this court. In *Herring v. Herring's Estate*, 94 Iowa, 56 (62 N. W. Rep. 666), it was held that it was error to allow a plaintiff seeking to establish a claim against an estate for services performed with the knowledge and consent of the deceased to testify that he performed the services and paid out money for improvements on real estate. It is said, in the last-cited case, that to permit such evidence to be introduced "is in direct conflict with the cases of *Peck v. McKean*, *supra.*, and with *Wilson v. Wilson*, 52 Iowa, 44 (2 N. W. Rep. 615)." It is needless to cite other cases in which the same rule is followed. An examination of them will show that this court has uniformly held that a party in a controversy against the estate of a deceased person is not a competent witness to testify to any fact which tends to establish an express or implied contract between himself and the deceased.

V. It ought to be stated here that, after the appeal was taken, and after the case was argued, Albert E.

Connable, to whom was awarded the sum of twenty-eight thousand six hundred and fifty-six dollars, filed an affidavit in the office of the clerk of this court, in which he stated he would have been better satisfied if the value of the farm had been fixed at sixteen thousand dollars, and that the charge of twenty-five thousand dollars is some nine thousand dollars more than it should have been. If Howard L. Connable, the other son, had joined in this request, the concession would have been acted on, and the award modified to that extent; but, in the absence of such consent, we must sustain the report, as we believe it is supported by a fair preponderance of the evidence. The case demands no further consideration, and the order approving the report of the executors is **AFFIRMED**.

P. C. DUNHAM, et al., v. ORVIS FOX, et al., Appellants.

Certiorari: TRUSTEES: Highways. The proceedings of township 2 trustees, under Acts Twentieth General Assembly, chapter 200, section 4, authorizing a consolidation of all the road districts in a township into one highway district on proper petition therefor, are judicial in their nature, and, therefore, subject to review on *certiorari*, under Code, section 3316, when the trustees have exceeded their jurisdiction.

Setting Aside Illegal Highway Order: ACTION BY TAXPAYER. A taxpayer may maintain proceedings to set aside an illegal order of the township trustees, consolidating all the road districts in the township, although he would not be prejudiced by a legal consolidation.

Petition and Remonstrance: WITHDRAWAL BY REMONSTRANCE. A signer of the petition required by Acts Twentieth General Assembly, chapter 200, section 4, relating to the consolidation of road districts of a township on petition of a majority of the voters, may withdraw his name therefrom any time before action is taken; and the signing of a remonstrance to such consolidation, by one who had previously signed the petition, operates to withdraw his signature from the petition, where the remonstrance is *presented before action is taken*.

100	131
111	186
100	131
143	423

Appeal from Crawford District Court.—HON. Z. A. CHURCH, Judge.

THURSDAY, DECEMBER 10, 1896.

CERTIORARI to the defendants, as members of the board of trustees of Boyer township in said county, to test the legality of the proceedings of the board in the consolidation of the roads of the township. Judgment for plaintiffs, and the defendants appealed.—*Affirmed.*

Mackenzie & Dewey and Phillips & Barrett for appellants.

J. P. Conner for appellees.

GRANGER, J.—I. The cause was submitted on an agreed statement of facts, from which it appears that the defendants are the trustees of Boyer township; that a petition was presented to the board to consolidate the road districts of the township into one highway district; that the names on the petition represented a majority of the voters of the township; that a remonstrance was also presented with the petition, on which were names appearing on the petition; that, deducting from the names on the petition those appearing on both the petition and the remonstrance, the remainder would not be a majority of the voters of the township; that the board disregarded the

In addition to the above, it is admitted that the plaintiffs, three in number, are legal voters and
1 taxpayers in Boyer township. As the order of consolidation affects every road district in the township, it must affect their interests. It is true that it does not appear that a legal consolidation would be to their prejudice or injury. The objection made to the consolidation is not that it will result to the prejudice or injury of any persons because of inexpediency, but because it is unlawful. It hardly needs argument to show that the change in the road districts, contemplated by the order, if put into effect, will be to the prejudice of any taxpayer if the order is void, for the effect is to abandon the present districts as to officers, and all the details of their operations, and put in operation a system not authorized, and hence one likely to be set aside at any time. It would seem that any citizen and taxpayer could protect himself against such contingencies. In *Van Wagenen v. Supervisors*, 74 Iowa, 716 (39 N. W. Rep. 105), the question of a right of a taxpayer to maintain the suit was not expressly decided, because not raised; but a suit was so prosecuted by a taxpayer under circumstances as open to question as this. In *Collins v. Davis*, 57 Iowa, 256 (10 N. W. Rep. 643), a certiorari proceeding, the question of the interest essential to maintain such suit is discussed, and kindred cases are cited and considered; and the rule of the case clearly justifies the right of these plaintiffs to maintain this action. Such a right has full support in reason.

III. The statute permits the writ to issue in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded its proper jurisdiction, or is otherwise acting
2 illegally. It is urged that the board of trustees

it was acting is section 4, chapter 200, Acts Twentieth General Assembly, as follows: "The board of township trustees may, at their regular meeting in April, 1884, or at any regular meeting thereafter, on petition of the majority of the voters of said township, consolidate the several road districts in the township into one highway district; provided, however, that nothing herein contained shall be construed to prevent the trustees from again sub-dividing the township into sub-districts and returning to the present plan of road work, at any regular April meeting, after two years' trial of the plan provided by this act." It will be seen that the statute is not mandatory, but permissive only. It devolves on the board a discretionary duty after jurisdiction once attaches. The board is to consider the needs of the township, and grant or refuse the prayer of the petition. Such an act is so far judicial as to come within the provisions of the Code authorizing *certiorari* proceedings. It makes no difference that a civil township is not a municipal corporation, and only a sub-division of a county. The trustees are no less a board, with duties both ministerial and judicial, and subject, when of the latter kind, to review and correction. The law permits the writ to issue "where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded its proper jurisdiction." Code, section 3216. The act, and the section in question, denominates the trustees "the board of township trustees," so that it comes within the letter of the law.

IV. There is a claim that the board had no authority to consider the remonstrance, but should have taken the petition as presented. Reference is made to some provisions of our law, wherein the right to remonstrate is granted in express terms, and it is argued that, where no such right is granted, it does not exist. There is a provision in the law as to petitioning boards of

supervisors for the re-location of county seats, that remonstrances may be also filed, and defining by whom they may be signed. Nothing in the language granting such a right justifies the inference that it was intended thereby to deny that right in matters disconnected from the subject in which the right is given, if it otherwise existed. It does not seem to be the purpose of the act, under which the board proceeded, to permit a consolidation, except a majority of the voters desire it, and express their desire in the manner designated. The petition presented was signed by eighty-nine voters, of which forty signed the remonstrance, thereby indicating that they had changed

3 their minds, and did not desire the consolidation. We think that, before action, petitioners had the right to, by remonstrance, express to the board the fact that they did not desire to be regarded as petitioners. This conclusion is sustained by the following authorities: *State v. Board of Supervisors of Polk County* (Wis.) (60 N. W. Rep. 266); *Slingerland v. Norton* (Minn.) (61 N. W. Rep. 322); *Black v. Campbell*, 112 Ind. 122 (13 N. E. Rep. 409); *State v. Eggleston*, 34 Kan. 714 (10 Pac. Rep. 3); *Hays v. Jones*, 27 Ohio St. 218; *Dutton v. Village of Hanover*, 42 Ohio St. 215; *State v. Commissioners Nemaha County* (Neb.) (4 N. W. Rep. 373). These cases all sanction the right of a petitioner to withdraw his name from the petition, and in some the right is authorized, in terms, by remonstrance. In none is there an intimation that it could not be done in that way. In some of the cases it was done in other ways, and the right sustained. It is hardly to be questioned that the signing of a remonstrance after signing a petition would have the effect of a withdrawal in the absence of explanation. It is to be understood that the remonstrance came with the petition to the board of trustees, so that it became operative in determining the question

of jurisdiction. Had the trustees obtained jurisdiction before the remonstrance was presented, the case would come within the rule of *Seibert v. Lovell*, 92 Iowa, 507 (61 N. W. Rep. 197), and the remonstrance could only be considered on the merits of the application. With our conclusion as to the law, under the facts as agreed, the board of trustees was without jurisdiction, and its act was void.—AFFIRMED.

ROBINSON & COMPANY, Appellants, v. D. J. BERKEY & MARTIN, *et al.*

Warranty: WAIVER. A provision in a contract for the sale of goods,
 1 containing a warranty to the effect that the warranty shall not
 2 take effect unless the goods are settled for on their delivery, is
 valid, and, unless waived, is a sufficient answer to an alleged
 breach of warranty.

Corporations: POWER OF AGENT TO MODIFY CONTRACT: *Contract*
 4 *provision against modification* Notwithstanding a provision in a
 contract between a corporation and a private party, that no agent
 shall have power to waive or modify the contract, an agent having
 authority to do so, may validly waive compliance with any of its
 conditions.

Pleading: ULTIMATE FACTS A pleader may state ultimate facts,
 7 and is not required to state the evidentiary facts from which the
 ultimate facts follow, hence he need not so state his facts as that
 they would be unobjectionable, were they propounded to wit-
 nesses, as questions

SAME. An answer alleging, as a breach of warranty, that the machine,
 7 "with proper management, would not and could not and did not
 do as much, or as good work, as other machines of similar size for
 the same purpose," is not bad, as alleging legal conclusions.

Submitting Pleadings as Part of Charge. While pleadings, which are
 5 couched in untechnical language, may be given to the jury to
 enable them to understand the issues involved, such issues should
 be presented in the language of the court, where the language
 used in the pleadings is technical and is not such as a jury will be
 likely to understand clearly.

SAME. Where a cause of action is presented in two counts, it is not
 5 error to submit the cause to the jury, to find independently on each
 count.

"General Verdict" Defined. Separate findings upon each of two
6 issues presenting separate causes of action are general verdicts,
and unobjectionable.

Offered Instruction: WAIVER BY. That an offered instruction which
is denied deals with the right to certain relief as being due, as
8 matter of law, does not waive the privilege of having the right to
such relief submitted, as a question of fact.

Appeal from Johnson District Court. — HON. M. J.
WADE, Judge.

THURSDAY, DECEMBER 10, 1896.

ON the fifth day of May, 1893, the defendant firm made a written order to the plaintiff company for a thrasher, self-feeder, and band cutter, and a Perfection weigher, at the agreed price of eight hundred and twenty-five dollars, for which the plaintiff was to receive in exchange another thrasher, stacker, weigher, and sieve; the property so taken in exchange being valued at three hundred and seventy-five dollars. For the remaining four hundred and fifty dollars the defendant was to give two notes, each for two hundred and twenty-five dollars, due January 1, 1894 and 1895. To the order is attached a warranty that the thrasher is well made, of good materials, and that with proper management it will do as much and as good work as any other of similar size made for the same purpose. On the same day defendant made another written order to the plaintiff for a Farmer's Friend straw stacker, to be attached to the thrasher, for the agreed price of two hundred and fifty dollars, for which two notes, of equal amount, were to be given, due at the same time as the others. To this order was also attached a warranty that may be hereafter noticed. The following is a part of the warranty attached to the first order: "Conditioned that, if inside of ten days from the day of the first use of the said machinery, it shall fail to fill

the warranty, written notice shall be given immediately by the purchaser to Robinson & Co., at Richmond, Indiana, by registered letter, and written notice, also to the local agent through whom the same was received, stating particularly what parts and in what way it fails to fill the warranty, and a reasonable time allowed the company to get a man, or men to the machine, and remedy defects, if there be any (if it be of such a nature that a remedy cannot be suggested by letter). The purchaser also to render all necessary and friendly assistance and co-operation in making the machinery a practical success. If any part of the machinery cannot thus be made to fill the warranty, that part shall be returned by the purchaser to the place where it was received, and the company shall either furnish another machine, part, or attachment, which shall perform the work, or return the money and notes which it received for the machine, or give credit for the amount received for the part or attachment which may have failed to fill the warranty, and thereby be released from any further liability herein." The machinery under both orders was delivered, and the notes, as agreed upon in both orders, were made and placed in the hands of R. L. Dunlap, who was plaintiff's agent at Iowa City. The property to be given in exchange was never given to plaintiff, and the defendant by injunction proceedings prevented the delivery of the notes by Dunlap to plaintiff, because of which this action is brought to recover the sum of one thousand and seventy-five dollars, the agreed price for the machinery under the two orders. The defendant firm, as such and as individuals, admit the above facts, as well as others that may be noticed in the opinion, and plead, by way of defense, a breach of the warranties in the orders, and that upon a failure of the plaintiff to make the machinery do work as warranted, they rescinded the contract

of sale, and offered to return the machinery, which was refused; and they then enjoined the delivery of the notes to plaintiff, to avoid their passing into the hands of innocent purchasers, and to enforce their right of rescission. There was a verdict for the defendants, and from a judgment thereon the plaintiff appealed.—*Reversed*.

Remley & Ney for appellants.

Baker & Ball and *Joe A. Edwards* for appellees.

GRANGER, J.—I. The following is a part of the contract of warranty in the first order: "Failure to settle for the machinery at the time and place of delivery * * * shall be a waiver of the
1 warranty, and release the warrantor, without in any way affecting the liability of the purchaser for the price of the machinery or the notes given therefor." Appellant claims that the neglect of the defendants to deliver the old machinery, and their action in stopping the delivery of the notes to plaintiff, is a waiver of the warranty, and hence, that no advantage can be taken of it to defeat a recovery. It relies on *Davis v. Robinson*, 67 Iowa, 355 (25 N. W. Rep. 280), which case was again appealed and reported in 71 Iowa, 618 (33 N. W. Rep. 132). It is not to be doubted, on the authority of that case, that, if there was a failure to settle by the delivery of the old machinery and the giving of the notes, it waives the warranty, the breach of which is defendant's only defense, and plaintiff should recover, unless defendant pleads and establishes a legal excuse for not so doing. In the answer defendants admit the failure to deliver the machine, and that, as we view it, is the practical effect of their plea as to the notes. So that, unless they plead and establish an excuse for the

failure, the warranty is waived. It is contended in argument, that this is done, and the following appears in the answer: "They admit that they executed their promissory notes and left them with one R. L. Dunlap, and that they afterward procured a temporary injunction restraining Dunlap from delivering the same to the plaintiff. * * * Further answering the said first count, they admit that they refused to deliver to plaintiff the said 33-inch cylinder, Roberts, Thorp & Company thresher, the Reeves stacker, the Perfection Weigher, the oats and timothy sieves; but they deny that they have continued to use the same, and aver that they have only refused to deliver, as they refused to deliver the said notes,—that is, until the said new outfit by them purchased, should be made to comply with the warranties given by the plaintiff in making the sale thereof; and they say plaintiff agreed thereto." We assume that it would not be contended that the plea, failure, or refusal is of any avail, except as it is supported by the alleged agreement of plaintiff. Of course, if the failure to deliver was by agreement with plaintiff, it would be good. In argument it is urged that the agreement is shown to have been made with the agent, Dunlap, and it is insisted that he had authority to do so; but we are not called upon to consider that question, because, on the trial, the issue we are considering seems to have been excluded. By operation of law, the averment as to the additional agreement was denied, and the case presented an issue on which appellees now insist there was testimony. It is insisted that the testimony is uncontradicted. If by that it is meant that it is so uncontradicted that the fact is to be taken as established, it is a misapprehension. The fact remains to be found. The fact of the authority of the agent with whom the agreement is said to have been made, is at least doubtful in view of

correspondence had. The court, in its instructions, specified the issues to be considered, and in express terms limited them to two, being the two breaches of warranty alleged. In the first instruction, after stating the issues, the court said: "In connection with this warranty there are certain conditions to be performed by the purchaser; but under the evidence in the case there is no issue for your determination upon the performance of those conditions, except as to whether assistance was rendered to the plaintiff in

2 attempting to make said machine work as hereinafter explained." Certainly, the failure of settlement was a condition of the warranty.

It was pleaded, and admitted, and a plea in excuse or avoidance made, which was at issue. The above language excludes it from the consideration of the jury, and nowhere in the instructions is there language to overcome its effect. The result is that the court determined this issue for defendants, with the burden on them, for it permitted them to recover alone on the issues as to the warranties. Appellant asked several instructions on the question as to the failure to settle for the machinery, which were refused, so that it is

apparent that the point was in no way waived.

3 It is true that appellant's instructions, as asked, are based on a claim, under the record, of a right to a verdict as a matter of law; but that is no waiver of a right to have the question of fact submitted, if his instructions were refused, for, without a finding of the fact of an agreement as alleged, it was entitled to an instruction, asked, that a jury return the verdict for plaintiff.

II. Appellant makes a claim that, on this branch of the case, we should direct a judgment for the plaintiff; but we think not. If the facts as to the settlement are as alleged, we do not see why defendants should not be permitted to prove them. It is

thought that, because of a provision in the contract, that no agent or salesman has power to bind
4 the company by either verbal or written contracts or promises outside of the contract as written, no such change could be made. Such a condition, if valid, would prohibit absolutely a change by the parties, because the plaintiff is a corporation, and could only make a change by its agents. In *Osborne & Co. v. Backer*, 81 Iowa, 375 (47 N. W. Rep. 70), and again in *Peterson v. Machine Co.*, 97 Iowa, 148 (66 N. W. Rep. 96), we considered the legal effects of such a condition in a contract, and held that it did not prevent an agent from changing a contract. All has been said in support of the holding that need be. Under the issues as found, we think it competent for the defendants to show the agreement alleged, by showing authority in the agent, and the agreement.

III. In view of a new trial, it may be well to notice some other questions that may now properly be settled. It appears from the abstract that the court, in presenting the issues, attached carbon
5 copies of the pleadings, amendments, and exhibits, entire. The court then said to the jury: "Upon said petition and answer as amended, the issues in the case arise, and the evidence in the case has to be considered by you in relation to said issues, as explained in these instructions." It is not to be said that the instructions are such as to aid the jury to know the issues. The petition is quite brief, with the contracts and warranties attached. The answer is quite

the pleadings contain a plain statement of the matter in controversy, it may use the language of the pleadings. See *Lindsey v. City of Des Moines*, 68 Iowa, 368 (27 N. W. Rep. 283), and several other cases; and see, also, *Crawford v. Nolan*, 72 Iowa, 673 (34 N. W. Rep. 754). We think the issues should be presented in the language of the court.

IV. The petition is in two counts, each presenting a cause of action, and the court submitted the case to the jury so that it should find independently on each cause; and of this appellant complains, on the ground that it was entitled to a general
6 verdict. The separate findings, on the separate causes of action, are general verdicts. They were not special verdicts. "A general verdict is one in which the jury pronounces generally for the plaintiff or defendant upon all or upon any of the issues." Code, section 2806. "A special verdict is one in which the jury finds facts only." Code, section 2807.

V. There was a motion of some eleven divisions. Each asking to strike some part of the answer. The ground of most of them is, that the averments state conclusions, and not proper facts. One of them is as follows, and includes the argument: "(3) The plain-
7 tiff moved to strike out the following words from the fourth page of defendant's answer: 'And these defendants say that, with proper management, the said machine would not, and could not, and did not, do as much work, or as good work, as other machines of similar size, for the same purpose.' Such a statement is absolutely a conclusion, and no evidence

by a minute statement of the particular facts on which the conclusion is based. The argument indicates that the facts should be pleaded so as not to be objectionable as questions to a witness. That would be pleading the evidence, which is not required. The pleading should state ultimate facts, and not the evidence of such facts. *Davenport Gas Light Co. v. City of Davenport*, 15 Iowa, 6; *Lambert v. Palmer*, 29 Iowa, 104. Legal conclusions are not to be pleaded, and, likely, conclusions of facts may be so stated as not to be sufficiently plain. In this case that is not the fact. The facts are pleaded minutely, and the language objected to, is but an averment of conclusions from such facts, and to fix their relations to the terms of the warranty.

It is not necessary that other questions should be considered; the judgment will stand REVERSED.

C. E. BULL V. KEENAN & SONS, Appellants.

Appeal: OBJECTION BELOW: In a suit to set aside a judgment by confession, an objection to the form of the action, in that plaintiff's remedy was at law, cannot be raised for the first time, on appeal.

Vacation of Judgment by Confession: DAMAGES: *Attorney fees.* In a suit to set aside a judgment by confession, expenses incurred by the plaintiff in the litigation, as attorney's fees, hotel expenses and loss of time, cannot be recovered as damages.

Appeal from Van Buren District Court.—HON. M. A. ROBERTS, Judge.

THURSDAY, DECEMBER 10, 1896.

THIS is a suit in equity to set aside and cancel a judgment rendered by confession in favor of the defendants, against the plaintiff. There was a full

hearing on the merits, and a decree for the plaintiff. Defendants appeal.—*Modified and affirmed.*

Mitchell & Sloan for appellants.

Wherry & Walker for appellee.

ROTHROCK, C. J.—It appears from the pleadings in the case that in April, 1891, the plaintiff was justly indebted to the defendants in the sum of about six thousand dollars. The defendants were live stock commission merchants in the city of Chicago. The plaintiff was a shipper of live stock to the Chicago market, and the defendants sold the stock for the plaintiff, and the plaintiff made drafts on the defendants for the proceeds of the sales of the shipments. The indebtedness of six thousand dollars occurred by reason of overdrafts drawn by the plaintiff, which the defendants honored and paid. On the twenty-third day of April, 1891, a representative of defendants came to the home of the plaintiff, for the purpose of collecting the debt. The parties went to Keosauqua, and consulted lawyers. The amount of indebtedness was not in dispute. The exact sum on that day was six thousand, forty-nine dollars and sixty cents. A written confession of judgment for that amount was prepared, and signed by the plaintiff, Bull, and left with the attorneys. After this was done, Bull, and Paris, who represented the defendants, returned to Milton, the home and place of business of Bull, for the purpose of having further negotiations in the way of a settlement and securing payment. An arrangement was made by which Bull and his wife made two promissory notes, of two thousand dollars each, and Bull gave his individual note for the balance of the debt. Paris returned to Chicago, and the confession of judgment was left in the custody of the

attorneys at Keosauqua. The notes executed by Bull and his wife were fully paid when they became due. The individual note of Bull has not been paid. When it became due, it was renewed, by taking it up and giving a new note, and a like renewal was again made. This last renewal note remained unpaid, and the defendants herein caused the confession of judgment to be filed in the office of the clerk of the district court of Van Buren county on the twenty-seventh day of October, 1893, and a judgment was entered for the full amount of the original debt, with interest thereon. Execution was issued on the judgment so entered, and certain persons were garnished on execution. Thereupon the petition in this case was filed, in which the plaintiff averred that the confession of judgment was wrongfully and fraudulently entered, in violation of an express oral agreement that, upon the settlement of the claim by giving the notes, the confession of judgment should have no force or validity. It was prayed in the petition that the judgment be set aside, and decreed to be void and of no effect, and that the defendants be forever enjoined from collecting or attempting to collect the same. The only real issue raised by the answer was a denial of the proposition that the confession of judgment was superseded by the settlement and execution of the notes. Evidence was taken upon this issue, and the court found the fact to be as plaintiff claimed. There is no doubt in our minds that the court correctly determined that question. There is a very decided preponderance of evidence in favor of the plaintiff on this proposition. It consists of the testimony of the plaintiff and of Paris, the representative of the defendants, who made the settlement; and they are strongly corroborated by the fact that a settlement was actually made, and notes taken for the debt.

II. Counsel have discussed and cited authorities upon the question whether the judgment was void, or voidable, merely, and whether a suit in equity is a proper remedy to pursue. It is claimed in 1 behalf of defendants, that the proceeding should have been instituted under certain statutory provisions. We think we are not authorized by the pleadings in the case to determine these questions, because they were not made in the district court. No objection was made to the form of the action by demurrer, motion or answer. The defendant did not, by pleading, in any way, present any demand for judgment on the unpaid note in the event that it should be found that the judgment was wrongfully entered. They filed the note with the clerk at the time the answer was filed, for the use and benefit of the plaintiff. They relied upon the validity of the judgment for a complete defense to the action; and the decree provided that it was without prejudice to any action the defendants might hereafter bring on the note. It is well understood that an appeal in an equity cause is tried anew in this court on precisely the same issues which were involved in the trial court. No new issues can be presented in this court. For aught that appears in this record, the questions discussed by counsel were not presented to the district court, except the issues of fact, as to the unauthorized filing and entering of the judgment.

III. The plaintiff claimed five hundred dollars as damages for the wrongful acts of the defendants in causing the confession of judgment to be entered and attempting to enforce it. No items of damages are set out and specified in the petition. The plaintiff was examined as a witness in relation to his alleged damages. He enumerated, as damages, lost time in resisting the enforcement of the judgment, hotel bills paid, and attorney's fees expended in contesting the

execution, and for the time lost and expenses paid in attending to the hearing of this case, and for one hundred dollars for the fees of his attorneys for trying this case. The court allowed the full amount of the claim as sworn to by the plaintiff, and rendered judgment against the defendants for two hundred and forty dollars and fifty cents. It is scarcely necessary to say that the plaintiff was not entitled to recover any of the items which he expended in this litigation. The rule in this state is that nothing aside from taxable costs can be recovered in an action. There is nothing in this case within any statutory exception to the rule. The decree of the district court will be reversed so far as the allowance of the damages is involved, and the setting aside of the judgment by confession is affirmed; and, in view of this modification, each party will be taxed with his own costs in this court.—MODIFIED AND AFFIRMED.

ROBERT WALLER, MARY A. KEMLER, and SIDONIA
HOSFORD, Executors of the Estate of RICHARD
WALLER, Deceased, v. WILLIAM HINTRAGER,
Appellant, and PAUL TRAUT, Treasurer of
Dubuque County, Iowa.

Review of Evidence on Appeal in Equity: PROOF OF SERVING NOTICE TO REDEEM. Defendants, to sustain the issue that a notice to redeem from tax sale was served August 11, introduced the return of service, and the affidavit of defendant that he had such notice served on said day. The papers were in the hand writing of the defendant, except the signature to the affidavit. They

Appeal from Dubuque District Court.—HON. J. L. HUSTED, Judge.

THURSDAY, DECEMBER 10, 1896.

PLAINTIFFS bring this action in equity to cancel a certain tax deed, issued by the treasurer of Dubuque county, to the defendant, William Hintrager, and for an order requiring Paul Traut, treasurer, to sign a certain certificate of redemption from tax sales of the land covered by said deed. The defendants, Hintrager and Traut, answered separately, and the defendant Hintrager, by way of cross-petition, asked that Patrick T. Ward, Bernard Ward, and John Ward be made parties, and that his (Hintrager's) title to said land be established as against the plaintiffs and said Wards, and all persons claiming under or through them, and that he be awarded the possession of said land, and for costs. Bernard Ward and John Ward made default. Patrick T. Ward answered said cross-petition, and thereafter said Patrick Ward, by his guardian, Bernard Ward, filed an amended and substituted answer asking the same relief prayed for by the plaintiffs, or that he be allowed to redeem for his ward by paying the amount legally due. The issues and facts will appear in the opinion so far as it may be necessary to state the same in considering the questions argued. Decree was entered in favor of the plaintiffs and Patrick T. Ward, substantially as prayed. Defendant William Hintrager appeals.—*Affirmed.*

Powers, Lacy & Brown for appellant.

Longueville & McCarthy for appellees.

GIVEN, J.—I. But two issues are presented in argument, namely: (1) Whether plaintiffs' redemption

was in time, or, in other words, whether appellant's notice to redeem was served on Ann and Patrick T. Ward, on the eleventh or on the thirteenth day of August, 1892. (2) Whether, under the facts, plaintiffs or Patrick T. Ward are entitled, in equity, to redeem. The following is a sufficient statement of the facts for the purposes of these questions: Ann Ward, and Patrick Ward, her son, were for many years the owners of the land in question, and occupied it as their home. On April 9, 1880, they executed a mortgage on the land to plaintiffs' testator, and on December 13, 1889, executed another mortgage thereon to the plaintiffs. In September, 1892, plaintiffs caused said mortgages to be foreclosed, and on January 5, 1893, purchased, the land at the foreclosure sale, receiving the sheriff's certificate therefor, which they now hold. Plaintiffs agreed with Patrick Ward to extend the time to redeem from said foreclosure sale, giving him the right to sell the property, and that any surplus realized after paying the mortgages, should be his. On December 7, 1885, this land was sold to the appellant for the taxes of 1884, for eighty dollars and sixteen cents. In August, 1892, the appellant caused notice of redemption to be served upon Ann Ward and Patrick Ward. Appellant claims that this service was made on the eleventh day of August, while plaintiffs and Patrick Ward claim that it was made on the thirteenth. On the eleventh day of November, 1892, the plaintiffs paid to the county auditor the amount then required to redeem the land from said tax sale, and received from the auditor his certificate of such redemption. On the same day they presented said certificate to the defendant Traut, county treasurer, to be countersigned by him, whereupon he entered thereon the following: "Presented for counter signature November 11, 1892. Refused to sign and enter because deed had already been applied for and issued."

It appears that on said eleventh day of November, 1892, and before said certificate was presented to be countersigned, the defendant treasurer had issued to appellant a tax deed for said lands in pursuance of said tax sale and said notice to redeem.

There is no dispute as to the foregoing facts, except as to the date on which appellant's notice to redeem was served. It further appears that on November 30, 1887, Ann Ward, accompanied by her son John, applied at the office of the county treasurer for the purpose of paying the taxes due against said land. One of the clerks in the office, whose duty it was to receive taxes and give receipts, proceeded to ascertain the amount due on that day, going to the auditor's office for that purpose, but it does not appear that Ann Ward or her son knew that he went to the auditor's office, or that it was necessary to do so. This clerk told Mrs. Ward that the amount due was one hundred and forty-three dollars and seventy-five cents, and gave her a memorandum in writing to that effect. John Ward insisted that the taxes were not so high, that there was some mistake, and said they would see Mr. Meyer, the then treasurer. Mrs. Ward and her son called on the treasurer at his residence on the same day, and exhibited to him the said memorandum, and paid him the amount stated therein as due upon said land, for which the treasurer gave a receipt as follows: "Dubuque, Nov. 30, 1887. Received of Ann Ward one hundred and forty-three and seventy-five one-hundredths dollars, to apply on her 1884, 1885, and 1886 taxes. C. H. Meyer, Treasurer." The treasurer promised Mrs. Ward that "when he went to the office he would receipt it on the books, and have it show up there." This occurred late in the day, and Mrs. Ward and her son started for their home, some eighteen miles distant. A day or two thereafter, Mr. Meyer gave to his deputy, Mr. McKinley, said memorandum, and the amount of money it called for, saying

that the parties had been at his residence, and that he had given them a receipt for the money, as they wished to go home immediately. Mr. McKinley started to make out a receipt, and found that the subsequent tax had been paid to the treasurer after said memorandum had been made out, and that it would therefore require something over four dollars more to redeem. Thereupon, Mr. McKinley wrote Mrs. Ward, stating the facts, but no answer was received, nor does it appear that Mrs. Ward ever received the communication. The amount received by Mr. Meyer was kept separately from the public money, and retained by him until after the trial of this case. On October 31, 1892, which was a short time prior to her death, Ann Ward conveyed all her interest in said land to Patrick Ward. There is some contention as to the capacity of Ann Ward and Patrick Ward to transact business at the time of these occurrences. While Mrs. Ward was uneducated, and inexperienced in business transactions of this character, she was evidently prudent in the management of her own affairs, and as capable of transacting business as women of her age and opportunities generally are. Patrick Ward was also uneducated, of dissolute habits, and a spendthrift. It was for these reasons that his guardian was appointed during the pendency of this action. Neither of these persons was so mentally incapacitated as to be incapable of transacting business.

II. It is not questioned that the plaintiffs had a right, under the statute, to redeem from the tax sale within the prescribed time. The question is whether they had that right on the eleventh day of November, 1892, and this must be answered by determining whether appellant's notice to Ann and Patrick T. Ward to redeem was served on the eleventh or on the thir-

right to redeem, under the statute, on the eleventh day of November, 1892; but, if the service was on the thirteenth day of August, 1892, they had the right to redeem on November 11, 1892. The evidence on this issue is somewhat lengthy, and quite conflicting, and it will serve no good purpose to set it out or discuss it in detail. On the one hand, we have the return of John J. Bradley, showing service on Ann and Patrick T. Ward on the eleventh day of August, 1892. Also the affidavit of appellant that he served said notice, through John J. Bradley, on the eleventh day of August, 1892. This return and affidavit purports to have been sworn to by the affiants before J. J. Murry, a notary, who was also a deputy in the treasurer's office, on the eleventh day of August, 1892. These papers are marked: "Filed this eleventh day of August, 1892. Paul Traut, Treasurer of the county of Dubuque, Iowa, by J. J. Murry, Deputy." These papers are in the handwriting of appellant, except the signatures of Bradley, Murry, and Paul Traut, by Murry. The dates, and the words, "Filed this 11th day of August, 1892," are in appellant's handwriting. These papers were verified at the store of appellant at about 7 o'clock in the evening, Mr. Murry having been called upon to come there for that purpose. There is some evidence tending to corroborate the claim that this service was made on the eleventh day of August, 1892. As against this, we have the positive testimony of Patrick T. Ward and Kate Ward that it was on Saturday, August 13, 1892, that Bradley was at Ward's place, and served the notice on Patrick Ward. They give as a reason for remembering the date, that it was on the Saturday preceding August 15, "a holy day always kept by the family, and Catholics generally." They are also corroborated to some extent by William McDermott. The force of the presumption that arises from the return is lessened somewhat by the fact that the dates

and filing marked were all written by the appellant, and, we are inclined to think, were not, therefore, noticed by the notary at the time he signed the same, and took the papers into his possession as deputy treasurer. As already said, we will not discuss the evidence in detail. It is sufficient to say that we think the positive testimony of Patrick Ward and of Katie Ward, whose credibility is not questioned, more than overcomes the presumption that arises in favor of the correctness of the return. To support the return, the testimony of Bradley and certain memoranda and circumstances are relied upon. Bradley's reputation for truthfulness is so successfully attacked that we do not think his testimony entitled to much credit. The memoranda relied upon are such as not to be entitled to much weight, and the circumstances are explainable consistently with the positive statement of Patrick and Katie Ward. We conclude, after giving due weight to all the evidence upon this issue of fact, that the preponderance is in favor of the conclusion that a complete service of the notice to redeem was not made until August 13, 1892. As this conclusion fully disposes of the case, we need not consider the other question discussed. The decree of the district court is **AFFIRMED**.

STATE OF IOWA V. GEORGE BEABOUT, Appellant.

100	155
104	13

100	155
117	492

100	155
118	500

100	155
120	247

Rape: WHEN ASSAULT AND BATTERY NOT INCLUDED: *Charge.*

- Where the only question contested on a trial for rape was as to
 4 the consent of the prosecutrix to the act of intercourse, it is unnecessary to instruct the jury, that the crime charged includes the offense of assault and battery; for there should be no conviction for assault and battery if the crime is clearly rape, nor where intercourse is had upon consent.

100	155
133	402

INSTRUCTION ON CONSENT: *Construed toge'her.* An instruction on a trial for rape, that if the jury find that the prosecutrix did not
 3 consent to the act of intercourse, directly or by inference, they will be justified in finding that it was by force, while not to be approved, may not constitute prejudicial error, when considered with the other instructions.

LIMITING WITNESSES ON IMPEACHMENT: *Discretion.* A court may
 2 in its discretion, limit the number of witnesses, both as to good and bad reputation of a witness sought to be impeached, to five, and this, though part of the five is supplied by reading as evidence, what a motion for continuance states absent witnesses would testify to if present.

CROSS-EXAMINATION. Where defendant said he "went to have some
 1 sport with the girls," he may be asked, on cross-examination, whether he meant sexual intercourse by such expression, and whether he did not know that such intercourse was a crime.

Appeal from Taylor District Court.—HON. H. M. TOWNER, Judge.

THURSDAY, DECEMBER 10, 1896.

THE defendant was indicted, tried and convicted of the crime of rape, committed upon the person of Myrtle Bristow, and he appealed from the sentence and judgment of the district court.—*Affirmed.*

L. T. McCoun and J. R. McCoun for appellant.

Milton Remley, attorney general, and *Jesse A. Miller* for the state.

ROTHROCK, C. J.—The crime with which defendant was charged, was alleged to have been committed on the thirtieth day of September, 1895. The defendant is a married man, and at the time of the trial he was twenty-eight years of age, and engaged in keeping a drug store, at Hopkins, a village in the state of Missouri, near the Iowa state line, and about ten miles from Bedford, the county seat of Taylor county, in this state. The complaining witness, Myrtle Bristow, arrived at the age of fifteen years, on the twenty-fourth day of November, 1895, some two months after the crime, if any, was committed. It does not appear that she was abnormally developed, physically. On the contrary, some of the witnesses in the case spoke of her and companion, of about the same age, who was with her when the alleged crime was committed, as little girls. It appears that she and her companion, who was named Edith Corwin, were schoolmates. On the morning of September 30, 1895, they went to school, and the teacher or superintendent of the school suspended them from further attendance, for what was thought to be improper conduct, tending to demoralize the morals of the school. Immediately upon being suspended they left the town, and walked to Bedford, a distance of ten miles. They did not return to their homes, and their families, on making inquiry about them, learned that they were at Bedford, and an arrangement was made to have them brought home. The defendant, and one Lewis, learned that the girls were at Bedford, and they procured a single-seated buggy, and drove to that place, and ascertained that the girls had, through directions from their

families, been found by the marshal of Bedford; and they were being kept by him, awaiting some one who, they were advised, would come from Hopkins to take them home. The defendant appeared at the place where the girls were at about 10 o'clock that night, and represented that he had come after the children to take them home. After some parley with the marshal, he consented to let the defendant take them to Hopkins. The marshal required him to bring the buggy where the girls were, and they started on their way. The defendant assured the marshal that he was all right, a married man, and that he ran a drug store in Hopkins. When they had driven about two blocks south and a block west they found Ewing in waiting. He got into the buggy, and they left the town, on the way to their homes. While on the way, they stopped, and got out of the buggy; and Beabout had sexual intercourse with the prosecuting witness, and Ewing with Edith Corwin. There is no conflict in the evidence as to the fact of sexual intercourse. The four parties to the acts were all examined as witnesses on the trial. They differed as to disgusting details, and their testimony will not be repeated here. Beabout and both the girls testified that they stopped and got out of the buggy twice on the way. Ewing appeared to have remembered of but one stop. The prosecuting witness testified that the first time Ewing attempted to have intercourse with her, and that she successfully resisted him, and that during that time Beabout had intercourse with Edith Corwin, and that at the second halt in the journey the defendant dragged her out of the buggy, and, notwithstanding her resistance, he overpowered her and accomplished his purpose. The party arrived at Hopkins at about two o'clock in the morning. The girls were let out of the buggy some distance from their homes. Myrtle went to her home, and it was at once discovered that

something unusual had happened. Her underclothing was bloody. She was greatly excited, and cried, and, after some hours, told her mother that she had been ravished by Beabout.

We have thus far stated facts which are practically undisputed, except as to the manner in which the two men gratified their desires. They testified in the most positive terms that there was no force used, but that the girls were willing and anxious to have sexual intercourse with them. On the other hand, if the testimony of the girls is to be believed, both of the men were guilty of the crime charged in the indictment, and the attending circumstances were of the most brutal and revolting character.

The main contention of counsel for appellant is that the verdict was against the evidence, and that a new trial should have been granted for that reason. Much of the argument in behalf of appellant is devoted to review and analysis of the testimony of the witnesses, and counsel for the state, following the same lines, discuss the questions, and claim that the evidence of guilt is absolutely conclusive. It is not our practice to review the evidence in detail. After carefully examining the whole record, we think the verdict is not only supported by sufficient evidence, but that any other result than a verdict of guilty ought not to have been expected. It is true that the general reputation of the prosecutrix and her companion for chastity and moral character was attacked, and witnesses testified to facts which indicated they were wayward children; but witnesses on the part of the state testified otherwise, and that question was fairly submitted to the jury. There are

and all her acts and demeanor showed unmistakably that she had been outrageously abused; and a most controlling consideration is that, about forty-eight hours after the affair occurred, two respectable physicians made a physical examination of the prosecuting witness, and the jury were fully warranted in finding from their testimony that the sexual intercourse with defendant was the first time she was ever engaged in that act. If the jury found that the physicians testified truthfully, they might well conclude that, while she was in some respects a wayward girl, she had not surrendered her person to the lust of any man. We will not set out the testimony of the physicians.

II. It is urged that the court erred in overruling an objection to a question asked the defendant on cross-examination, as to whether he went to Bedford for the purpose of having intercourse with the girls. The objection was not well taken. The witness had stated in his examination that he went to Bedford "to have some sport with the girls." It was strictly proper to ask him whether he meant by that expression that his intention was to have intercourse with them. It was also fairly within the line of cross-examination to ask him if he did not know that such intercourse would be a crime. Other objections were made to questions asked the defendant on cross-examination, which we do not think demand special mention. They are of no more consequence than those above considered.

III. There were witnesses called by the state and the defendant for the purpose of impeaching and sustaining the character of other witnesses. It appears that the court made a ruling limiting the number to five impeaching witnesses in behalf of each party. The defendant, in a motion for a continuance, had set out facts which it was claimed witnesses would testify to if present. The state

admitted that the witnesses would so testify if produced, and the motion to continue the cause was overruled. That part of the motion which set out the evidence of the absent witnesses was read to the jury, as testimony to be considered the same as if the witnesses had been present, and testified in the presence of the jury. The testimony of other impeaching witnesses was introduced by the defendant, and, after the testimony of more than five was introduced, the state asked that the rule be enforced, and objected to further testimony on that point, and the objection was sustained. The defendant excepted to the ruling, and asked to introduce the depositions of two other witnesses. This ruling of the court is claimed to be erroneous. The power of the court to limit the number of witnesses upon a given point is not an open question in this state. In *Bays v. Herring*, 51 Iowa, 286 (1 N. W. Rep. 558), and *Bays v. Hunt*, 60 Iowa, 251 (14 N. W. Rep. 785), this court sustained such a rule as applicable to general impeaching testimony. The enforcement of such a rule is within the discretion of the district court and we discover no reason for holding that the discretion was abused.

IV. It is contended that the last part of the eighth paragraph of the charge of the court to the jury is erroneous. It is in these words: "If, in the case at

bar, you find that defendant had sexual intercourse with the prosecuting witness, Myrtle Bristow, at the time and place mentioned in the indictment, and that the said Myrtle Bristow did not consent to such intercourse, directly or by inference, then you would be justified in finding such intercourse was by force, within the meaning of the law." It is said that this part of the charge of the court is erroneous, because its tendency was to lead the jury to believe that the burden of proof was on the defendant to show that the prosecutrix consented to the intercourse. The

case of *State v. Philpot*, 97 Iowa, 365 (66 N. W. Rep. 731), is cited as sustaining the proposition that the instruction is erroneous. An examination of that case will show that the judgment was reversed, but not on the ground that the instruction, when taken in connection with the whole charge, was erroneous. It is true that the part of the instruction objected to was in the same language in both cases; and this court, in *Philpot's Case*, said: "We refer to it in order that we may not, by silence, seemingly approve the charge, as being a correct abstract proposition of the law." Without setting out the other parts of the instructions, it is sufficient to say that while it is true the use of the words "did not consent to such intercourse, directly or by inference," do not of themselves express the thought that the state is required to prove the want of consent, yet, when considered with other parts of the charge, they are not open to any valid objection. The jury were instructed again and again, in the most positive terms, that the prosecution must show that the act was done by force, and against the will of the complaining witness.

V. It is urged that the county attorney, in the closing argument to the jury, was guilty of misconduct, by making inflammatory remarks, calculated to prejudice the jury against the defendant, and that he misstated testimony, and made assertions not warranted by the evidence, and that a new trial should have been awarded for that reason. Several pages of the abstract consist of what is claimed to be part of the argument objected to. It does not appear that any objection was made to the argument when it was made, and the record does not show that it was incorporated in the bill of exceptions. But, whether it was or not, we do not think that there was any such misconduct as to require a reversal of the judgment.

VI. The court instructed the jury that the crime of rape included an assault with intent to commit a rape and a simple assault. Counsel claim that the court erred in failing to instruct the jury that
4 the crime charged included an assault and battery. We do not think there was any reversible error in this omission in the charge. It is not necessary to include the minor offenses in the instructions in all cases. Where the evidence shows beyond question that if the defendant was guilty of the offense charged, if guilty at all, because the intercourse was by force and against the will of the prosecuting witness, the offense committed was rape. If it was by consent of the parties to it, no assault or assault and battery was committed. See *State v. Cole*, 63 Iowa, 695 (17 N. W. Rep. 183); *State v. Casford*, 76 Iowa, 330 (41 N. W. Rep. 32).

VII. The defendant was sentenced to twenty years' imprisonment in the penitentiary. It is insisted that the punishment is excessive. It is provided by section 5160, McClain's Code, that a person guilty of the crime of rape "shall be punished by imprisonment in the penitentiary for life or any term of years." A full consideration of all the evidence in the case impresses us with the thought that we ought not to disturb the judgment of the district court.

There are other questions presented by counsel for appellant, which we do not think demand special consideration. The judgment of the district court is
AFFIRMED.

C. M. JACKSON, Appellant, v. F. O. ADAMS.

Books of Account of Corporation: FOR WHAT ADMISSIBLE. In an action on a non-negotiable note, made in consideration of certain corporate stock, where defendant pleaded as a counter-claim a note made by
1 the payee in consideration of stock in a kindred corporation, subsequently organized, and both parties used as evidence the books of the original corporation, all of the contents of the books which tended to enlighten the jury on the motive of the parties and their relations to each other in carrying on the corporations, was properly admitted.

CONDITION OF CORPORATION AS EVIDENCE. It was not error to
2 instruct the jury that they might consider the condition of the corporation at the time of the trial, so far as it might have a bearing on the agreement and transactions relating to the promissory notes in controversy.

Opinion Evidence: HANDWRITING: Instructions. Where witnesses have testified about the genuineness of a signature, both from comparison and from familiarity with the signature of the alleged
3 subscriber, it is proper to charge that, "evidence of this character being, in fact, the result only of a comparison of the controverted signature with the genuine signature of the defendant, as the same is remembered and impressed on the mind of the witness, whose opinion is so given, or with the other signatures proved to be those of defendant, it is regarded by the law as unsatisfactory, and such as ought not to overthrow the direct and positive testimony of a credible witness who testifies from personal knowledge."

Appeal from Des Moines District Court.—HON. JAMES D. SMYTH, Judge.

THURSDAY, DECEMBER 10, 1896.

ACTION at law upon a non-negotiable promissory note. There was a trial by jury, which resulted in a verdict for the defendant. The plaintiff appeals from a judgment on the verdict.—*Affirmed.*

W. C. McArthur and C. L. Poor for appellant.

Seerley & Clark for appellee.

ROTHROCK, C. J.—I. The note upon which the action is founded is for two thousand dollars. It is dated February 13, 1894, and payable six months after date. It is made payable to Ezra A. Brenizer only, and it is expressly stated in the note that "it is not negotiable." Brenizer, the payee, assigned the note to plaintiff, Jackson. The answer of the defendant sets up a want of consideration for the note, and also pleads a counter-claim, founded upon a promissory note, dated August 13, 1889, by which Brenizer promised to pay to the defendant, the sum of one thousand eight hundred and seventy-five dollars, with interest from date at the rate of eight per cent. per annum. The case was tried upon the issues thus made. There is really no question in the case that, if the note of one thousand eight hundred and seventy-five dollars is a valid instrument, as between Brenizer and the defendant, it is a complete discharge of any obligation of the defendant to pay the note upon which the suit was brought. In other words, the note executed by Adams being non-negotiable, and payable to Brenizer only, any legal defense against the note is available as against Jackson, the assignee.

We have stated the issues in a general way. It should be further stated that the plaintiff filed a reply, from which it appears that Brenizer gave the note of one thousand eight hundred and seventy-five dollars to the defendant for certain shares of stock in a corporation named the Tinkham Smoke Consumer Company, which Brenizer purchased from one Smith, and for which purchase Adams furnished the money, and the note was given to Adams by Brenizer. It is alleged in the reply that the purchase of the stock from Smith

for one thousand eight hundred and seventy-five dollars included also a promissory note of said corporation for one thousand four hundred and thirty-one dollars and seventy-three cents, payable on demand, and also certain claims or accounts owing to said company which had been assigned to Smith; that Brenizer delivered to the defendant the note of the corporation, and the said accounts and claims, as security for the payment of the note, for one thousand eight hundred and seventy-five dollars; and that it was verbally agreed between Brenizer and Adams that the first money paid to the corporation in its business should be applied towards the payment of the note for one thousand four hundred and thirty-one dollars and seventy-three cents, with interest; and that such payment should be a credit on note of Brenizer for one thousand eight hundred and seventy-five dollars, and the balance to be paid out of the proceeds of the business of the company due to Brenizer, after paying expenses. It should also be stated that the defense of want of consideration for the note in suit is founded upon a claim by Adams that it was a mere accommodation to Brenizer, without any money or property being delivered to Adams therefor; but that it was to enable Brenizer to obtain possession of some stock or assets of another corporation. If the testimony of Adams in reference to the want of consideration for the note is true, it was a complete defense to the action. A great volume of testimony was taken as to the business relations between Adams and Brenizer. This evidence cannot be set out here in a way to be understood by the general reader without unnecessarily extending the opinion.

It appears that, when Brenizer bought his stock in the corporation, he was the owner of one-third of the stock, and Adams owned two-thirds. They undertook to introduce and sell the smoke consumer. As we

understand the evidence, their manner of proceeding was to use the device for consuming smoke only for the purpose of selling territory to others, and thus to dispose of the patent. It was not a patent right which sold on its own merits to the trade generally. The parties traveled the country from Denver to Boston. They sold territory, and took notes for large amounts, upon which but a small part was collected. Brenizer formed a new corporation in Boston, called the New Draft Combustion Company. That corporation had no capital stock excepting the patent of the Tinkham Smoke Consumer Company. Afterwards Brenizer went to Chicago and became the owner of fifteen thousand dollars of stock in a corporation called the Butman Furnace Company. He negotiated with Adams to sell him eleven thousand five hundred dollars of stock in that company. During these
1 negotiations Adams executed the note in suit.

The books of account of the Tinkham Smoke Consumer Company were introduced in evidence. They were referred to by the witnesses for each party. The plaintiff objected to the introduction of that part of the books which showed the financial condition of the company in July and in the fall of 1890. The objection was overruled. It is contended in behalf of the plaintiff that this ruling was error, because the evidence objected to did not tend to prove any issue in the case. We have stated the course of business of Adams and Brenizer in a general way, for the purpose of saying that, as both parties used the books of the corporation as evidence, all of the contents of the

II. The plaintiff excepted to the tenth paragraph of the charge to the jury, in which the jury were directed that the present condition of the corporation might be considered by them so far as the same might have a bearing upon the agreement and transactions of the defendant and Brenizer, relating to the promissory notes in controversy. We do not think the assignment of error attacking this instruction was well taken, in view of the course of business pursued by these parties.

III. The eleventh paragraph of the instructions to the jury is as follows: "(11) Certain witnesses have testified before you as to their opinion respecting the genuineness of the alleged signature of the defendant to one of the papers introduced in evidence in the case, and it will be proper for the jury to carefully consider the testimony of the said witnesses, and to give it such weight and value as it is justly entitled to, taking into account the experience and knowledge of the witnesses about the matter concerning which their opinion has been given. But it is proper here to observe that evidence of this character being in fact the result only of a comparison of the controverted signature with the genuine signature of the defendant, as the same is remembered and impressed upon the mind of the witness whose opinion is so given, or with the other signatures proven to be those of the defendant, it is regarded by the law as unsatisfactory, and such as ought not to overthrow the positive and direct testimony of a credible witness who testifies from personal knowledge." This instruction is assailed by counsel for appellant, not so much as being abstractly erroneous as that it leaves out of consideration the fact that Brenizer testified as a witness that Adams signed the paper. That fact was in no manner withdrawn from the consideration of the jury. Brenizer

testified as a witness, without objection, that it was Adams' signature. All of the law upon any one question is not required to be given in any one paragraph of the charge. It is further claimed that the experts who testified that the signature in question was that of Adams, were not experts who testified by comparison merely, but they were familiar with his signature. As we understand the instruction, it is not limited to witnesses who testify by mere comparison. It recognizes the fact that the witnesses considered the contested signature of the defendant with "his genuine signature, as the same is remembered and impressed upon the mind." This is the mental operation required of an expert who testifies from his knowledge of the handwriting in dispute, and not from mere comparison. The instruction was not erroneous. It is in substantial accord with an instruction approved by this court, under substantially the same state of facts, in *Bruner v. Wade*, 84 Iowa, 698 (51 N. W. Rep. 251).

IV. Lastly, it is contended that the verdict of the jury is contrary to the evidence. We do not concur in this claim. Taking all of the facts disclosed in evidence, it presented such a case as authorized a verdict for either party. The judgment of the district court is **AFFIRMED**.

ELIZA E. BRADLEY, Appellant, v. THOMAS MILLER,
Sheriff, and JOHN WALLACE.

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103	366
100	169
114	660
100	169
127	737
100	169
144	71

Notice to Release Attachment. Under McClain's Code, section 4195, providing that an officer shall be protected from liability for a

- 1 levy on property belonging to a third person, unless such person gives notice that the property belongs to him, stating the nature of his interest, how it was acquired, and for what consideration, a notice to the sheriff given by the claimant of property taken under attachment, which fails to state the source of claimant's interest, or the consideration paid therefor, is insufficient to charge the officer.

NONE NEEDED TO HOLD ATTACHING PLAINTIFF. But, where such
 2 unlawful levy was made under the direction and authority of the attaching plaintiff, notice is not necessary in order to render such plaintiff liable to the claimant of damages in a *suit for conversion*. What the rule would be in *replevin* is left undecided.

Action Against Sheriff and Attaching Plaintiff: JOINT DEMURRER. When an action is brought against the sheriff for levying an
 2 attachment upon the property of a third person and jointly against the plaintiff for directing the levy, a demurrer interposed by the defendants jointly, on the ground that no sufficient notice to release was given, should be overruled, for no notice at all is required to recover of the attaching plaintiff.

Appeal From Ruling on Demurrer: JUDGMENT. An order sustaining
 3 a demurrer is appealable, even, though no final judgment is entered upon it, or rendered by the court.

Appeal from Calhoun District Court. — HON. Z. A. CHURCH, Judge.

THURSDAY, DECEMBER 10, 1896.

ACTION at law, for the conversion of certain property alleged to belong to plaintiff. The court sustained a demurrer to the plaintiff's petition, and plaintiff appeals.—*Reversed.*

M. R. McCrary and Brown McCrary for appellant.

Stevenson & Lavender, for appellees.

DEEMER, J.—The petition alleges that the plaintiff is the owner of certain personal property, which she claims the defendant sheriff, by direction of his co-defendant, wilfully, unlawfully, and maliciously, seized, under a writ of attachment, issued against one W. Bradley, and which they still retain, and have converted to their own use; that she gave notice to Miller of her ownership of the property, as by statute required, before bringing suit; but that he refused to release the same; and she asks actual and exemplary damages. To the petition is attached a copy of the notice which plaintiff claims she served upon the sheriff. This notice merely recites that plaintiff is the owner of the property levied upon; that defendants were notified before the levy that plaintiff owned the property; and that Wallace knew all about the ownership before the levy was made. To this petition defendants filed two demurrers. The first one was withdrawn by permission of the court before the second was filed, and the ruling of the court was upon the second demurrer. The grounds of this demurrer are, that the notice served upon the sheriff is not sufficient, under the statute, and for that reason defendants are not liable for converting the property. This demurrer was sustained, and the appeal involves the correctness of the ruling.

The statute having reference to the case is as follows: "An officer is bound to levy an attachment on any personal property in the possession of, or that he has reason to believe belongs to the defendant. or on

that such property belongs to him, and stating the nature of his interest, and the facts showing how he acquired such interest, and for what consideration, such officer may release the property, unless a bond be given as provided in the next section. But such officer shall be protected from all liability by reason of such levy, until he receives such written notice."

1 McClain's Code, section 4195. It will be observed that the notice given the sheriff in this case does not meet the requirements of the statute, in this: (1) It does not state how plaintiff acquired her interest in the property. (2) It does not give the consideration she paid. The notice is so defective that no action will lie against the

2 sheriff for serving the writ. It is insisted, however, that the defendant, Wallace, is responsible for his trespass and subsequent conversion of the property, no matter whether notice was given or not. A determination of this question necessitates careful examination of the petition, which we may observe is somewhat peculiar. It charges that the defendant, Miller, at the instance and by direction and order of defendant, Wallace, wilfully and maliciously seized the plaintiff's property, about November 24, 1894, and has since retained and converted the same to his own use, well knowing that the property belonged to the plaintiff. This action was apparently brought as at common law for the conversion of the property, and, but for the statute we have quoted, there is no doubt but that it would lie against both defendants.

It is elementary doctrine that the levy of an attachment upon the property of a stranger to the writ is a trespass on the rights of the owner, who may maintain either trover, trespass, or replevin, not only against the officer serving the writ, but also against the plaintiff in the suit, if it appears that the plaintiff either directed the act, or afterwards ratified it. And,

if trover be brought, no demand on, or notice to the officer need be proved, in the absence of a statute requiring it. Drake, Attachm. section 196; Shinn, Attachm. section 362. The statute suspends the right of action against the officer until the notice therein provided for has been given. It does not undertake to give the attaching plaintiff protection, nor is the giving of notice a condition precedent to a right of action against him. His liability stands as it was at common law, and if he direct the seizure of a stranger's property under a writ of attachment, and afterwards convert the property to his own use, he is liable. The notice is for the protection of the officer, who is bound to levy upon any property which the plaintiff directs him to seize, and the primary object of the statute is to compel the officer to make the levy, and protect him from liability for so doing. *Cheadle v. Guittar*, 68 Iowa, 680 (28 N. W. Rep. 14). The plaintiff in attachment acts at his peril, and there is no statute relieving him from his common law liability. The question presented does not seem to have been considered in any prior case in this court. It was indirectly involved in the case of *Peterson v. Foli*, 67 Iowa, 402 (25 N. W. Rep. 677). We there held that the plaintiff in an attachment suit was liable in conversion for the seizure and sale of the property of a stranger, and the statement of the case indicates that no notice was given the sheriff of the plaintiff's ownership. It must be borne in mind that this is an action for conversion, and not an attempt to recover the specific property levied upon. What the rule should be if it were an action of replevin, we will not attempt to decide. The cases of *Atwood v. Brown*, 72 Iowa, 723 (32 N. W. Rep. 108), and *Craig v. Fowler*, 59 Iowa, 200 (13 N. W. Rep. 116), lend some support to our conclusions. The demurrer was a joint one, and should have been overruled.

II. The record does not show that any judgment was rendered in the case. The recital is that "the court sustained the demurrer, and that plaintiff then and there refused to plead further, and elected
3 to stand on her petition, and then and there duly excepted to the ruling of the court in sustaining the said demurrer." In the case of *Cowen v. Boone*, 48 Iowa, 350, we held that such an order was appealable, although no final judgment was entered or rendered by the court. No further comment is necessary. The court erred in sustaining the defendants' joint demurrer, and its ruling is REVERSED.

O'LEARY & BROTHER AND THE STAYER & ABBOTT MANUFACTURING COMPANY V. THE MERCHANTS' AND BANKERS' MUTUAL INSURANCE COMPANY OF DES MOINES, IOWA, Appellant.

Insurance: WRITTEN CONSENT. An insurance policy providing that it shall be void, if the insured contracts other insurance on the property without written consent *indorsed on the policy*, is avoided by the assured's obtaining such additional insurance without obtaining the required indorsement, although he obtains a letter from the secretary of the company obtaining such consent.

ON RE-HEARING. - THURSDAY, DECEMBER 10, 1896.

SAME: Powers of secretary. The written consent of the secretary and general agent of an insurance company, that an insured may place additional insurance upon the property covered by its policy, is not the consent of the company which the policy requires to be indorsed thereon in writing, where the policy also provides that no agent shall have power to waive any provision thereof and no

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100 173
126 228

ACTION to recover the sum of five hundred dollars upon a fire insurance policy. Trial by jury. Verdict and judgment for the plaintiffs. Defendant appeals. —*Reversed.*

James A. Howe and Read & Read for appellant.

Thomas Stapleton and T. S. Kitchen for appellees.

ROTHROCK, C. J.—The policy of insurance upon which the action was brought, was issued by the defendant to O'Leary & Plank, on the twenty-fourth day of May, 1888. Afterward Plank assigned his interest in the policy to O'Leary & Bro. This assignment was assented to by the defendant, by the proper indorsement in writing as required by the policy. The property insured consisted of a stock of farm implements, wagons, buggies and other merchandise. The property was destroyed by fire in December, 1891. After the fire, O'Leary & Bro. assigned their claim against the defendant to the Staver & Abbott Manufacturing Company, one of the creditors of the insured. These transfers have no particular significance, more than that, the action appears to be maintained for the benefit of the last-named company. The policy provided that the contract of insurance should become void if the assured contracted other insurance on the property, without consent in writing indorsed on the policy by the company. And it further provides that no agent of the company has any authority to waive, modify, or erase any of the printed conditions of the contract. It appears that O'Leary & Bro. afterward insured the property in other companies, to the extent of one thousand five hundred dollars, without complying with the foregoing provision of the contract. The policy was not sent to the general office of the company

for its indorsement consenting to the additional insurance, and no reason is shown in this whole record why the consent of the company was not obtained in the manner provided for in the contract. It is not claimed that the clause in the contract in reference to additional insurance was in any manner concealed, or that the plaintiffs did not know that they contracted that they would not procure additional insurance without obtaining the required indorsement. On the contrary, it would seem, from the fact that the plaintiffs sent in the policy, and procured the consent to the change of ownership by an indorsement in writing, that they were fully advised of the terms of the contract.

The plaintiffs claim that they procured the consent by writing a letter to the company, and that they received a letter in reply, from the secretary, consenting to the additional insurance. Neither of these alleged letters, and no copies thereof, were produced on the trial. O'Leary and his brother both testified, as witnesses, to the contents of the alleged letters. The secretary of the company testified that he neither received nor answered such a letter. It is contended in behalf of appellant that, although there may be a conflict in the evidence as to whether a letter was written and answered, the evidence did not show a compliance with the contract on the part of the plaintiffs. This is the main question in the case, and we think the court should have sustained objections to the evidence, and should have instructed the jury that, under the undisputed facts in the case, the plaintiffs were not entitled to a verdict, because they did not comply with their contract. There is no principle of law which sanctions any such failure to abide by a contract of insurance. It will be observed that this question does not involve a waiver of proofs of loss, or of holding the company liable for the acts of its

agents in effecting insurance. And there ought to be no question that an insurance company has the right to so contract as that its liability consequent upon a change in the contract, shall be in writing. These views are supported by the following cases: *Zimmerman v. Insurance Co.*, 77 Iowa, 685 (42 N. W. Rep. 462); *Kirkman v. Insurance Co.*, 90 Iowa, 457 (57 N. W. Rep. 952); *Hankins v. Insurance Co.* (Wis.) (35 N. W. Rep. 34); *Cleaver v. Insurance Co.* (Mich.) (32 N. W. Rep. 660); *Insurance Co. v. Watson*, 23 Mich. 486; *Smith v. Insurance Co.* (Vt.) (15 Atl. Rep. 353); *Gladding v. Insurance Co.* (Cal.) (4 Pac. Rep. 764). It is true that the secretary of an insurance company is an agent clothed with greater authority than adjusting or soliciting agents, but it is not an unreasonable requirement that the policy holder should comply with his contract, in a matter of such importance as procuring additional insurance; and the reason of such a rule is exemplified in this case by the fact that when the fire occurred, the insurance on the property was about equal to its value. As this disposition of the case leads to a reversal, other alleged errors need not be considered. —REVERSED.

SUPPLEMENTAL OPINION ON RE-HEARING.

Appeal from Iowa District Court.—HON. S. H. FAIRALL,
Judge.

THURSDAY, DECEMBER 10, 1896.

THE policy of insurance upon which recovery is sought in this action was issued to O'Leary & Plank on May 24, 1888. Thereafter, and with the consent of the company, as by the policy provided, Plank assigned his interest in the policy to O'Leary & Bro. The policy covered a stock of farm implements,

including wagons, buggies and twines. December 10, 1891, the property was destroyed by fire. Thereafter O'Leary & Bro. assigned their claim against the defendant company to the Staver & Abbott Manufacturing company, a creditor of the insured. The cause was tried to a jury, and a verdict rendered for the plaintiff on which a judgment was entered. Defendant appeals.—*Reversed.*

Read & Read for appellant.

Thomas Stapleton and *T. S. Kitchen* for appellees.

KINNE, J.—This cause was heard at the January term, 1896, and an opinion filed on February 7, 1896, reversing the judgment of the lower court. A re-hearing having been granted, and the case again argued, it is now before us for determination. In the former opinion but one question was considered, as we then deemed it the controlling question in the case. On a re-examination of the case, we are still of the opinion that no other question argued requires special consideration. The policy provided that: "This contract shall be void and of no effect unless consent in writing is indorsed hereon by the company in each of the following instances, viz.: If the assured shall now have, or hereafter make or procure, any other contract of insurance, whether valid or not, on property conveyed in whole or in part by this contract. * * * No agent of this company has any authority to waive, modify, erase, or strike out any of the printed conditions of this contract. And it is mutually understood and agreed by and between the

After the policy had been issued, O'Leary & Bro. procured additional insurance thereon in other companies in the sum of one thousand five hundred dollars. No written consent for the same was ever given by the company, unless that hereafter mentioned can be so construed; and no consent was ever indorsed upon the policy by the company. The plaintiffs allege that O'Leary & Bro., in writing, informed the defendant's secretary of their desire to take additional insurance, and that the defendant consented thereto in a letter written and signed by the defendant's secretary. Defendant takes issue on these averments, and also pleads the conditions of the policy above set out; avers that additional insurance was procured upon the property by O'Leary & Bro., without the knowledge or consent of the company, and in violation of the terms and conditions of the policy. Evidence was introduced tending to sustain the respective allegations. Appellant contends that, even if it be found that O'Leary & Bro. wrote to the defendant for permission to take the additional insurance, and if the secretary replied in writing consenting thereto, still it is not shown that plaintiffs have complied with the terms and conditions of the policy with respect thereto. Their claim is that the consent to additional insurance must be in writing by the company, and must be by it indorsed upon the policy. Appellees claim that, if consent in writing was given by defendant's secretary, it is a compliance with the terms of the policy, though it was never indorsed thereon. The secretary of the company, who in this instance gave the consent to the additional insurance if it was given, was not the company, and could not consent for it, unless authorized so to do. Here is a positive provision of a contract, expressly assented to by the assured, whereby all agents of the company are prohibited from doing the

act claimed to have been done in this case. The secretary, though an officer, and, as the evidence shows, a general agent, is nevertheless an agent within the provision of the contract prohibiting agents from consenting to additional insurance. True it is, this defendant is a corporation, and must, of necessity, act through its agents; and it may be that, as a general agent of the defendant, he was, by the laws of the corporation, clothed with power to act for it in the matter of consenting to the taking of additional insurance. There is, however, no evidence in this record as to the character and extent of his powers further than that he countersigned policies, did consent to an assignment of this policy, and approved the risks taken by the company. It is urged that because he was a general agent we may presume that he had power to waive an express provision of the policy prohibiting him from doing the act which it is claimed he did do. If the act in controversy was one not prohibited by the express terms of the contract, or if the contract was silent respecting it, it may be that we should be warranted in presuming that such power was possessed by the secretary and general agent, as it is manifest that the power to do the act must, of necessity, rest somewhere. In this case the company itself has taken from its secretary, by the terms of the contract, whatever power he might otherwise have had to consent to additional insurance, except as is provided in the policy. In the absence of evidence that power had been reposed in the secretary and general agent, by the by-laws of the company, or in some other way, to abrogate and set aside the express provisions of the policy, which are a clear limitation upon his powers, the latter are binding upon him as well as upon the assured, who assented thereto. As said in *Mechem*, Ag. section 287: "The general agent, therefore, binds his principal when, and

only when, his act is justified by the authority conferred upon him." Nor can we presume that Kirkman had authority to act contrary to, and in violation of, the terms of the contract. *Hollis v. Insurance Co.*, 65 Iowa, 458 (21 N. W. Rep. 774). If authority to do the act in question rested in the secretary and general agent, notwithstanding the provisions of the policy, it should have been shown by the plaintiffs. Our conclusion, then, is that the secretary and general agent, in view of the provisions of the policy, and in the absence of evidence showing authority, did not have authority to consent, as it is claimed he did, to the taking of the additional insurance. No case has been before this court in which the provisions of the policy were exactly like those in the case at bar. In *Kirkman v. Insurance Co.*, 90 Iowa, 457 (57 N. W. Rep. 952), a policy was considered which contained provisions very similar to those contained in the policy before us. It was said in that case: "There is no question as to the rights of the parties under such a contract as this. There is no statute of this state by which insurance companies are bound by all the acts of the agents which they send out to deal with the public, and the courts cannot say that a contract limiting the power and authority of agents is void. The plaintiff in this case must be held to have assented to this stipulation in the policy, and for aught that appears, she is bound thereby." This case was followed in *Ruthven v. Insurance Co.*, 92 Iowa, 316 (60 N. W. Rep. 666). In *Taylor v. Insurance Co.*, 98 Iowa, 521 (67 N. W. Rep. 579), in referring to similar conditions in a policy, we said: "The conditions of a policy upon which the defendant relies are, in the absence of statutory regulations, valid, and binding upon the plaintiff." See, also, *Zimmerman v. Insurance Co.*, 77 Iowa, 685 (42 N. W. Rep. 462). Without now determining whether, in case the secretary and general agent had

power to consent to the additional insurance, such consent would be binding upon the company, it not having been indorsed upon the policy, it may be proper to add that the cases relied upon by plaintiffs as holding that a waiver, if in writing, need not be indorsed upon the policy, even when so required by the contract of insurance, do not contain provisions like those in the case at bar. The provisions in the policy before us are not only materially different, but this policy contains additional provisions, which may have an important bearing upon the question presented. In the view we have taken, it was error to admit the evidence regarding the consent to the additional insurance. The jury should have been instructed that, as plaintiffs had not complied with the provisions of the policy with reference to additional insurance, they could not recover. For the reasons given, the judgment below is REVERSED.

CASCILDA LARAWAY, Appellant, v. S. P. ZENOR, Sheriff,
EDWARD H. LITCHFIELD, Intervener.

Adverse Possession: COLOR OF TITLE: *Husband and wife.* A quit-claim deed by a husband to his wife, of land held by him under a contract for its purchase, which, to her knowledge, had become subject to forfeiture because of his non-performance, is insufficient to vest her with color of title on which to rest a claim of adverse possession, based on husband and wife, going into possession, as against the other party to the contract of purchase or his successors, though she paid for the assignment made to him, with her separate property

Appeal from Boone District Court.—HON. B. P. BIRD-
SALL, Judge.

THURSDAY, DECEMBER 10, 1896

THIS suit was brought by the plaintiff to enjoin the execution against her by the defendant Zenor,

sheriff of Boone county, of a writ of possession involving the east half of the southwest quarter of section thirty-five, township eighty-two, range twenty-seven—eighty acres of land situated in that county. The writ was issued upon a judgment obtained in the district court in Story county, in a suit between the intervener, Edward H. Litchfield, as plaintiff, and Isaac Laraway, the husband of this plaintiff, as defendant. Plaintiff, after alleging that she was in no sense bound by said judgment, and that the sheriff had no authority to remove her from the land thereunder, also claimed to be the owner of the property in her own right, and asked for a temporary writ of injunction restraining the sheriff from removing her from the land in question. An order was made in chambers, for the issuance of the injunction, and at the first term following the commencement of the suit, Edward H. Litchfield, claiming to be the owner of the land, intervened, alleging his ownership, denying that plaintiff had any interest in the property, asking that his title be quieted against plaintiff's claim, and that the injunction be dissolved. Upon these issues, thus stated in brief, trial was had, which resulted in a decree in favor of the intervener, whereby his title to the land was quieted and confirmed as against the plaintiff's claim, and the injunction theretofore obtained, dissolved. Plaintiff appeals.—*Affirmed.*

A. J. Holmes and Shortly & Harpel for appellant.

Gatch, Connor & Weaver and Dyer & Stevens for appellees.

GIVEN, J.—I. As stated by counsel for plaintiff, the only question in the case is, not whether the plaintiff could have been removed under the writ of possession in the suit against her husband, nor whether

the injunction procured by her should have been vacated, but whether the plaintiff, or the intervener, is the true owner of the property. It is admitted by plaintiff that the patent, or government title, is in the intervener, and that the sole question for determination by this court, is that of the validity of the claim of plaintiff to ownership by adverse possession. Plaintiff's claim rests upon the following facts: G. W. Rowley entered into a contract in writing, July 27, 1874, with Edwin C. Litchfield, the then owner of the eighty acres of land in controversy, for the purchase of the same for one thousand dollars, to be paid part in cash, and the balance in eight equal annual payments, with interest, payments commencing on the first day of January, 1876. Said contract provides that the same will become forfeited by non-payment of any of said installments, or the taxes. Rowley took and held possession of the land until December 16, 1874, when, with the consent of Edwin C. Litchfield, he assigned said contract to A. A. Wilson, who agreed to fully perform the covenants thereof. Mr. Wilson went into possession of the land, and continued to occupy it until his death, October 19, 1877. On this contract, interest was paid as follows: February, 1875, twenty dollars; January, 1876, twenty-five dollars; and January, 1877, one hundred dollars. No other payments were made. July 15, 1878, Fannie Wilson, widow, Carrie E. Clark, daughter, and Isaac Clark, her husband, sole heirs of A. A. Wilson, with the consent of Edwin C. Litchfield, assigned said contract to Isaac Laraway, husband of plaintiff, he agreeing to perform all the covenants thereof. Soon thereafter, Isaac Laraway and the plaintiff, with their family, went to live on said land, and have ever since resided thereon. Intervener Edward H. Litchfield became seized of the interest of his father in said land on his death. Isaac Laraway failed to make any of the

payments called for by said contract, by reason of which it became forfeited by its terms. On August 26, 1879, Isaac Laraway entered into an agreement in writing with intervener for the purchase of said land for the consideration of one thousand three hundred dollars. One hundred and thirty dollars of this amount was to be paid January 1, 1881, and the balance in nine equal annual payments commencing January 1, 1882, with interest. This contract also provides that it shall become forfeited by failure to pay any of the installments or taxes. Isaac Laraway failed to make any payments whatever upon this contract. Isaac Laraway having failed to make the payment due January 1, 1881, intervener, on January 24, 1881, brought an action against him to recover possession of the land, and recovered judgment therefor, December 7, 1886. A writ to place Edward H. Litchfield in possession was issued on that judgment, and this action was originally brought to restrain the execution of that writ. Thus far it is entirely clear that plaintiff has no interest or possession of the land except as wife of Isaac Laraway, and that that interest and right of possession has been fully forfeited. Plaintiff alleges, as the basis of her ownership and right to possession of the land, as follows: That on and prior to the third day of August, 1878, she was the sole owner of a certain tract of land in Missouri; that on that day, in pursuance of an agreement between her and the said widow and heirs of A. A. Wilson, deceased, she conveyed to said Fannie Wilson, said Missouri land; that in consideration thereof, said Fannie Wilson, Carrie E. Clark, and Isaac Clark conveyed to her by deed all their right,

recorded, while intervener contends that no such deed was ever executed; and herein we have the controlling contention in this case. It further appears that on the thirtieth day of December, 1880, Isaac Laraway, for the recited consideration of seven hundred dollars, executed to his wife an absolute bill of sale of certain farm implements, one heifer, turkeys, chickens, eighteen hundred bushels of corn, and one hundred bushels of oats, "now in the possession of said Cascilda Laraway in the county of Boone and state of Iowa." This was recorded December 31, 1880. On the thirtieth day of December, 1880, Isaac Laraway also executed to his wife, for the recited consideration of nine hundred and seventy-five dollars in hand paid, a quit-claim deed for one hundred and sixty acres of land, including the land in question, which deed was recorded on the same day. Isaac Laraway had no claim whatever to the eighty, other than that in suit, except under a lease.

II. Prior to August 3, 1878, these parties had negotiated and agreed upon an exchange of Mrs. Laraway's Missouri land, for the Wilson interest in the land in controversy, and on that day met at the office of Cardell & Shortly, in Perry, Iowa, to complete the deal. Plaintiff contends that on that day Mrs. Wilson and Mr. and Mrs. Clark, executed to her a quit-claim deed for the land in controversy, in consideration of her deed to Mrs. Wilson for the Missouri land. There is a conflict in the evidence as to whether a deed was executed to the plaintiff, and we think the preponderance is in favor of the conclusion that there was not. There was no necessity for such a deed. The only interest that the Wilson heirs had was under the Rowley contract, and this interest would be fully transferred by an assignment of the contract. The Wilson heirs, either then or theretofore, assigned the Rowley contract to Isaac Laraway, and therefore were

not likely to make a deed to Mrs. Laraway. It is true the assignment to Isaac Laraway and the consent of Mr. Litchfield thereto, are dated at Ogden, Iowa, July 15, 1878; but we are satisfied that the assignment and the agreement to perform the conditions of the contract were written, ready for signatures, at Ogden, where the consent of Mr. Litchfield's agent had to be obtained, and that they were dated to correspond with the date of the consent. Mrs. Wilson and Mrs. Clark testified that they signed but one paper on August 3, and this, we have no doubt, was the assignment of the Rowley contract to Isaac Laraway. We are strengthened in the conclusion that no deed was executed to the plaintiff from the fact that none is produced, nor its absence satisfactorily accounted for. The plaintiff insists that she had no knowledge of the Rowley contract, nor of the assignments thereof, nor of the contract between Mr. Litchfield and her husband. In view of the relation of Mr. and Mrs. Laraway, and all the facts and circumstances proven, it seems to us incredible that she did not know of these transactions. We are convinced that Mrs. Laraway conveyed her Missouri land, in consideration of the assignment of the Rowley contract to her husband, and with full knowledge as to the nature of the contract, and that the transfer was to him. This being true, her possession, as well as her husband's, was not adverse to, but under the contract with, Mr. Litchfield. If the interest of the Wilson heirs had been transferred by deed to Mrs. Laraway, instead of by an assignment of the contract to her husband, the condition would be the same, for in neither case would her possession be adverse to intervener. The evidence shows that Mrs. Laraway exercised more control over the farm, in working, renting, and caring for it, than farmers' wives usually do; but this is explained by the fact that

her husband was absent from home much of the time, working at his trade and other employments.

III. We next inquire as to the effect that should be given to the quit-claim deed from Laraway to the plaintiff. The Rowley contract had long before become forfeited by its own terms, and neither plaintiff nor her husband had any rights under it. This quit-claim deed was made December 30, 1880, and on January 1, 1881, the contract between Litchfield and Laraway became forfeited by failure to pay the one hundred and thirty dollars due that day. All that Mr. Laraway had conveyed was his right under that contract, and, if that deed may be treated as a transfer of that interest, Mrs. Laraway has forfeited all rights under it by failing to make the payments required. Knowing, as we think she did, that Laraway had no interest in the land at that time except under his contract, she took the deed subject to it, and therefore it cannot be said that her possession under that deed was adverse to intervener. She testifies that the purpose of that deed was to divest her husband of the one-third interest that he had, as her husband, in her property. If such were the purpose, then clearly the deed does not furnish a color of title upon which to base ownership by adverse possession. We are satisfied that the execution of this deed and the bill of sale were not good faith transactions, and that the deed was made and received with the hope of thereby, in some way, fabricating a claim of title. It seems to us clear beyond dispute, that neither Mrs. Laraway nor her husband ever had a shadow of title to this land adverse to the title of Mr. Litchfield, that the only title they ever had was under the contracts with Mr. Litchfield, that the possession has been by Isaac Laraway, under said contracts, and that the plaintiff has had no other possession or claim of right except as the wife of Isaac Laraway. The decree of the district court is **AFFIRMED**.

STATE OF IOWA V. ED. HARRIS, Appellant.

Criminal Law: WAIVER OF TIME TO PREPARE FOR TRIAL. Where defendant moves for a continuance on the ground of absent witnesses, and the motion being about to be sustained, the state admits that the witnesses will testify as claimed, and the trial is then proceeded with without objection, he waives the right given by Code, section 4419, that he should be entitled to three days in which to prepare for trial, if, on entering his plea, he demands it.

Criminal Intent: INTOXICATION: Evidence. On a trial for burglary, where the defense was intoxication, evidence that witness had been robbed by defendant shortly before the burglary, is admissible to show that, at the time of the robbery, defendant was not intoxicated.

Appeal from Polk District Court.—HON. W. A. SPURRIER, Judge.

THURSDAY, DECEMBER 10, 1896.

THE defendant and one James O'Brien were jointly indicted, tried, and convicted of the crime of burglary. Harris alone appeals.—*Affirmed.*

MacKenzie & Dewey for appellant.

Milton Remley, attorney general, and *Jesse A. Miller* for the state.

DEEMER, J.—The indictment was returned on the eleventh day of April, 1895. On the same day the defendant was arraigned and entered his plea of not guilty. On the next day the case was called for trial, and the defendant then filed a motion for a continuance, based upon the absence of witnesses. This motion was about to be sustained by the court when the state admitted that, if the witnesses were present, they would testify as stated in the

motion; whereupon the motion for continuance was overruled, and the case proceeded to trial. The defendant took no exception to the ruling of the court, and made no further or other objection to proceeding with the trial. It is now insisted in his behalf that he was not allowed the three days provided by statute, within which to prepare for trial. The statute relied upon is as follows (Code, section 4419); “* * * The defendant shall, if he, upon entering his plea demand it, be entitled to three days in which to prepare for trial.” It will be observed, that the defendant did not demand the time, thus allowed by statute, at the time of entering his plea, nor did he, as we understand it, demand this time at any stage of the proceedings. When called for trial he presented a motion for a continuance, based upon the ground of absence of witnesses. This motion would have been sustained had it not been for the election of the state. By this election the defendant secured all that he demanded, and he then allowed the trial to proceed without objection. We have frequently held that the statutory provision quoted may be waived. *State v. Thompson*, 95 Iowa, 464 (64 N. W. Rep. 419); *State v. King*, 97 Iowa, 440 (66 N. W. Rep. 735); *State v. Jordan*, 87 Iowa, 86 (54 N. W. Rep. 63). It is manifest, that the defendant waived the time allowed by the statute, and that he cannot be heard to complain.

II. The defendants were each witnesses upon the trial, and they testified that they were so intoxicated at the time the crime is said to have been committed, that they were incapable of forming a felonious
2 intent. One of them testified that he was intoxicated all day and most of the evening on which the crime is said to have been committed. The other said he was intoxicated during the whole of that day and evening, and that he remembered being in the house that evening, but that was all he did

remember. To rebut this evidence the state introduced two witnesses, who testified that they were "held up" about ten o'clock in the evening of the day of the burglary, by these defendants. These witnesses detailed the separate occurrences, and gave evidence of facts and circumstances which were wholly inconsistent with the defendants' claim that they were drunk. The burglary occurred about twelve o'clock, midnight, and the robberies about ten o'clock in the evening. The lower court admitted this testimony for the purpose of showing the condition of the defendants as to sobriety, and carefully instructed the jury that they should consider it for no other purpose. This ruling of the court is assailed. We think the ruling was correct, and that the testimony was properly received in rebuttal of the evidence given by the defendants relative to their intoxication on the day in question.

III. Claim is made that the verdict is not supported by the evidence. It must be conceded that the conduct of the defendant and his companion, at the time they entered the house which they are charged with having burglariously entered, was very strange, and hard to be accounted for upon any theory except that they were intoxicated. But, whether they were drunk, and, if so, whether this intoxication was sufficient to justify their acquittal, were questions for the jury to determine. There was ample evidence to sustain the finding that defendant was responsible for his acts. The court clearly and correctly stated the law upon the subject, and the case is one where

STATE OF IOWA V. PATRIOK BRADY, Appellant.

Evidence: RECORD OF RAILROAD. The records made by the agent of railroad companies, showing daily sales of tickets, are admissible

7 as substantive evidence under the same circumstances in which they might be read to the jury by a witness who knew that they were true when made, but has no independent recollection, either before or after examining them, as to the sales to which they refer.

CLASSIFICATION BY WITNESS. A witness may—for the purpose of assisting the jury in reaching the inference to be drawn from a

4 comparison of the records of railroad companies, showing the sales of tickets during the time covered by the claims filed against the county by the overseers of the poor for the transportation of paupers with the claims in evidence classify—the claims with reference to the record of tickets sold.

TABULATION BY WITNESS. A tabulated statement prepared by an agent of railroad companies, from the companies' records, in evidence, showing the sales of tickets at a certain station during a

6 certain year, and a written statement purporting to be a list of all the names of paupers for whose transportation the overseer filed claims and received county warrants, with dates and destinations prepared by the county auditor from claims, in evidence, are admissible in a prosecution of the overseer for fraudulently making such claim and receiving warrants, and admissible to facilitate a comparison, by the jury, of the records and claims, where the records are complicated and the claims are numerous.

EXPLANATORY EVIDENCE: *Prejudice.* Where it is the duty of the state to explain marks upon a paper, in order to make it admissible, it will not be deemed prejudicial error that the witness, in making explanation, was compelled to impress the jury with the facts that the marks were made to check up fraudulent claims charged to have been made by defendants.

Fraud: SIMILAR FRAUDS: *Evidence.* All the claims filed with the

2 auditor by an overseer of the poor charged with defrauding the county by filing fraudulent claims for transportation of indigent poor persons, are admissible in connection with evidence tending to show that they were fraudulent, for the purpose of showing his fraudulent purpose in filing the claims upon which the indictment counts, and to show the existence of a systematic scheme or

NOTE.—As to the so-called American doctrine admitting evidence of a writing testified to by witnesses to have been made with knowledge of facts therein stated, but which they cannot now remember, see also *Curtis v. Bradley* (Conn.) 28 L. E. A. 143.

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plan to defraud the county, and thus to negative the idea that the filing of the claim in question was accidental.

Instructions: "FALSELY" CONSTRUED. An instruction in a prosecution for cheating by false pretenses, which used the word "falsely" to characterize representations which will warrant a conviction, is not prejudicially erroneous where that word as used in the instruction, manifestly, meant something more than "mistakenly," or "untruly," and the jury must have so understood.

Challenge to Juror. A challenge to a trial juror in a criminal case, is properly overruled where it is based on his testimony that he had read an account of the crime charged against the defendant in the papers, and had heard the matter talked about, and had formed an opinion with reference to defendant's guilt or innocence which it would require some proof to remove, where he further stated that he could render an impartial verdict on the evidence and instructions, without regard to what he had heard and read.

Objections: GENERAL AND SPECIFIC. An objection to the admission of part of the entries on an exhibit, the remainder of which are admissible, is not available, on appeal, where the only objection was to the entire exhibit, on the ground that it was incompetent, immaterial, and secondary.

Appeal from Wapello District Court.—HON. F. W. EICHELBERGER, Judge.

THURSDAY, DECEMBER 10, 1896.

DEFENDANT was indicted, tried, and convicted of the crime of cheating by false pretenses, and appeals to this court.—*Affirmed.*

Steck & Smith for appellant.

An objection on the ground of incompetency is sufficient, and it is not necessary that the party objecting should state the reasons of the objection.

Greenleaf v. Dubuque & S. C. R. Co., 30 Iowa, 302.

The erroneous admission of evidence for the state will not be considered to have been without prejudice, although there is other evidence in the case to the same effect.

State v. Kreder, 86 Iowa, 25.

When there has been error, presumption of prejudice arises, and if the record fails to satisfy the supreme court that no prejudice has been caused, then such error cannot be disregarded.

Potter v. Chicago, R. I. & P. R. Co., 46 Iowa, 399; *Strobel v. Moser*, 70 Iowa, 126; *Reynolds v. Keokuk*, 72 Iowa, 371; *McCormick Harvesting Machine Co. v. Jacobson*, 73 Iowa, 546.

If the defendant received any warrant from the auditor by reason of any false claim or statement, then this was a separate and distinct act, not in any manner connected with his other transactions.

In no event could evidence of other transactions be admitted in evidence for any purpose except that of showing guilty knowledge or intent.

3 Rice, Crim. Ev. section 157; Roscoe, Crim. Ev. 90, 94; *Rex v. Ball*, Russ & R. C. C. 132; *Com. v. Eastman*, 1 Cush. 189 (48 Am. Dec. 596.)

Milton Remley, attorney general, *Sumner Siberell*, county attorney, *J. C. Mitchell*, and *W. A. Work* for the state.

DEEMER, J.—During the year 1893, the defendant was the duly appointed and acting overseer of the poor in and for the city of Ottumwa. He was authorized by the board of supervisors to furnish transportation to indigent poor persons found within his jurisdiction, in order that they might be carried to the places of their respective legal settlements, in order that they might not become a charge upon the county of Wapello. For the amounts paid in procuring this transportation, he would file an account against the county, and the county auditor was authorized by the board to issue warrants from time to time for the amount of the claims so filed. During the year for which he was appointed, the defendant filed more than

five hundred and eighty claims for transportation, alleged to have been furnished to paupers, aggregating more than one thousand four hundred dollars. The indictment alleges that on or about the eleventh day of July, 1893, the defendant filed with the auditor of the county, a claim for three dollars for transportation furnished a woman and three little children to Chillicothe, Mo.; that this woman gave her name as Eliza Young, and said she wanted to get to Leavenworth, Kan.; that the defendant, when he filed the claim, knew that he had not furnished any transportation to Chillicothe, Mo., to any woman claiming her name as Eliza Young, and three little children, and that he knew that no woman claiming her name was Eliza Young, had applied to him for transportation to Leavenworth, Kan., or to Chillicothe, Mo., and that he well knew that every recital or statement in his said claim was false; and that he filed the claim designedly, wilfully, and falsely, with intent to defraud, and by such false pretense did obtain from the auditor a warrant for the amount of the claim. There was evidence tending to support each allegation of the indictment, and upon such evidence the defendant was convicted, and sentenced to the penitentiary for the term of two years.

I. The first error assigned relates to the overruling of a challenge interposed by defendant to a trial juror. This juror testified that he had read an account of the crime charged against the defendant in
1 all the papers which made mention of it; that he had heard the matter talked about, and that he had formed some opinion with reference to the guilt or innocence of the defendant, which he still

heard and read, and go into the trial of this case, and render a true and impartial verdict upon the evidence and instructions of the court, and upon that alone, without regard to what I may have heard and read. I think I could do that, the same as if I had never heard of it, but I had rather not sit on the jury. By the Court: The opinion I formed, I suppose is an unqualified opinion. I would try to hear the evidence in this case, and the instruction by the court, and render a true verdict, without reference to the opinion, and without reference to what I have read and heard, and I believe I could." The statements elicited from this juror were very similar to those appearing in the case of *State v. Munchrath*, 78 Iowa, 268 (43 N. W. Rep. 211); and, following that case, we hold that there was no error in overruling the challenge.

II. The court permitted the state to introduce in evidence all the claims filed with the auditor by the defendant, for transportation claimed to have been furnished by him to poor persons during the year 1893, and down to the twelfth day of January, 1894. It also permitted the state to introduce the records of the Chicago, Milwaukee & St. Paul Railroad; the Wabash Railroad; the Chicago, Burlington & Quincy Railroad, and the Chicago, Rock Island & Pacific Railroad, showing, or purporting to show, the ticket sales in their respective offices at the city of Ottumwa during
2 the year 1893. The admission of this evidence is complained of. It is said in argument that it is not competent for the state to give in evidence facts tending to prove other distinct offenses, for the purpose of raising an inference that the defendant has committed the crime in question; nor is it competent to show that he has a tendency to commit the offense with which he is charged. That such is the general rule, must be conceded. But to this rule there are at least two well defined exceptions, which are well stated

by Justice Stephen, in his work on Evidence (articles 10-12), as follows: "A fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith in any of the ways specified in articles 3-10, both inclusive, is deemed not to be relevant to such fact, except in the cases specially excepted in this chapter. (11) *Acts Showing Intention, Good Faith, etc.* When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion, may be proved, if it shows the existence, on the occasion in question, of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue, or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely, on the occasion in question, to act in a similar manner. (12) *Facts Showing System.* When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant." The first of these exceptions we have frequently recognized and applied to cases of this character. See *State v. Jamison*, 74 Iowa, 613 (38 N. W. Rep. 509); *State v. Walters*, 45 Iowa, 389; *State v. Saunders*, 68 Iowa, 370 (27 N. W. Rep. 455); *State v. Stice*, 88 Iowa, 27 (55 N. W. Rep. 17); *State v. Lewis*, 96 Iowa, 286 (65 N. W. Rep. 295); *State v. Kline*, 54 Iowa, 183 (6 N. W. Rep. 184). The evidence we have referred to is clearly admissible under the first of these exceptions stated above, for the purpose of showing the knowledge, intention, and bad faith of the defendant. It seems to us that the evidence was also admissible for the purpose of proving a systematic

scheme or plan on the part of the defendant to cheat and defraud the county, thus negating the idea that the presentation of the claim in question, was accidental, or through oversight, or mistake. 1 Greenleaf, Ev. (15th Ed.) section 53, note, and cases cited; *Commonwealth v. Robinson* (Mass.) (16 N. E. Rep. 452). The jury may well have found, from the evidence complained of, that the filing of the claim, and the receipt of the warrant charged in the indictment, was a part of a plan, or scheme, adopted by the defendant to cheat and rob the county. For this purpose, as well as for the purpose of establishing the defendant's knowledge of the falsity of the claim, the evidence was admissible.

III. The claims filed by defendant, and which were introduced in evidence, had blue lead pencil checks and figures upon them, which it is admitted were not there when defendant presented them to the auditor. The state introduced a witness to account for these figures, in the person of the deputy county auditor. He testified that he placed the marks and characters upon the claims, and that he did it for the purpose of showing that where he made checks he found no tickets sold, on the date of the claim, to the station to which transportation was claimed to have been furnished; and that, where he had made figures, they were put on to show that the actual railway fare was either more or less than the amount claimed by the defendant. Error is assigned upon the admission of these claims in evidence, because of the presence of these marks. We do not think the objection
3 was well founded. It was necessary for the state to satisfactorily account for these marks upon the papers, before they could be received in evidence. This it did by the evidence in question, and, while it was permitted to unduly impress upon the minds of the jury the object and purpose of the witness

in putting the marks and characters upon these papers, yet we think such evidence was not prejudicial, for reasons hereafter to be stated.

IV. Complaint is made of the ruling of the court in admitting what is known as Exhibits 7 and 13, to the jury. Exhibit 7, is a tabulated statement made by one Patten, the agent of the Chicago, Milwaukee & St. Paul and the Wabash and Iowa Central Railroads, from the records of said companies, showing sales of tickets at Ottumwa during the year 1893, which were introduced in evidence after having been properly identified. Exhibit 13, was a written statement prepared by the auditor, and his deputy, and purports to be a list of all the names of all paupers for which defendant filed claims for transportation, and received county warrants thereon, during the year 1893, and up to January 12, 1894, also the dates upon which the transportation was furnished, and places to which paupers were claimed to have been sent, and the amount paid for transportation. This statement was made up from the claims introduced in evidence, which aggregated more than five hundred. The records from the ticket offices were necessarily long, and somewhat complicated, as they covered the ticket sales of the different offices for the period of nearly one year. It is said that these exhibits were not the best evidence,—that they were secondary, hearsay, and incompetent. It is no doubt true that they were not substantive evidence tending to establish either the number or amount of claims filed by the defendant, nor of the number of tickets sold by the different railway companies. They were

Cadwell, 79 Iowa, 432 (44 N. W. Rep. 700); 1 Rice, Ev. p. 237; *Von Sachs v. Kretz*, 72 N. Y. 548; Bradner, Ev. pp. 308-310; *Casey v. Banking Co.*, 98 Iowa, 107 (67 N. W. Rep. 98); 2 Rice, Ev. pp. 745, 746, and cases cited.

V As to the first thirty-one entries on Exhibit 13, there is no evidence showing, or tending to show, that no tickets were sold to the persons indicated on this exhibit; for Mr. Van Patten did not take charge of the railway offices until March 24, 1894, and all that portion of Exhibit 7, antedating March 24, was withdrawn from the evidence. The objection defendant made to the exhibit when it was offered by the state did not point out the claim now relied upon by 5 the defendant. His objection was that it was incompetent, immaterial, secondary, and not the best evidence; not evidence of anything. Had the defendant made a specific objection to that part of the exhibit referred to, there is no doubt the court would have found some way to protect him without excluding evidence to which the state was entitled. Not having done so, he cannot now complain. *State v. Day*, 60 Iowa, 100 (14 N. W. Rep. 132); *Rindskoff v. Malone*, 9 Iowa, 540 But, aside from all this, we think it clearly appears that the defendant suffered no prejudice from the ruling. This exhibit was merely a tabulated statement of the claims filed with the county by the defendant, and, if there was nothing to indicate that these first thirty-one claims were fraudulent, it is difficult to see how the defendant could have been prejudiced. The presumption would be that the claims were *bona fide*. Just how defendant would be prejudiced by proof of *bona fide* claims filed by him, we are unable to see.

VI. Another witness was permitted to classify the claims filed by the defendant, to state the aggregate amount thereof, the total number of fares claimed to Chillicothe, Mo., and the amount of the

fare claimed in each instance. He was also allowed to state what the actual fare was to the various
6 points where defendant claimed to have sent paupers, and, finally to, give the difference between the amount of fare claimed by defendant, and the actual charge made by the railway companies. Most, if not all, of the testimony of this witness, was based upon his examination of the various papers in evidence; and we do not think the trial court abused its discretion in allowing such evidence to be introduced for the purpose of facilitating the trial, and aiding the jury in their efforts to arrive at just results. This practice seems to be justified by the authorities before cited, and we can see no good reason for disturbing the verdict on account of this procedure. The same reasoning will apply to the evidence of the deputy auditor, who made the pencil marks upon the claims filed by the defendant, to which we have before referred. It must be borne in mind that the records, statements, and claims from which these witnesses made their statements, and upon which they founded their conclusions, were all properly in evidence, and open to the inspection at all times of defendant and his counsel. This original evidence went into the jury room, with the exhibits before referred to; and, if there were any discrepancies, it was the duty of counsel to have called attention thereto, in order that the original records and claims might be examined, in order to determine upon the accuracy of these exhibits. While the course pursued was somewhat unusual,

daily sales at the city of Ottumwa during the year 1893. This claim presents the question of most doubt in the case. It must be conceded that these records are not books of account such as the statute contemplates. They are, in a sense, *ex parte* statements made and caused to be made by the witnesses who identified them, and are what might properly be termed "memoranda," made by the witnesses at the time of the transaction. Are these memoranda admissible in evidence, or can they be used by the witnesses who produced them, simply, as an aid to their recollection? This question has been given widely different answers by the courts of this country and of England. [The old common law rule seemed to be that such memoranda were not admissible; that they could be read by the witness after proper foundation had been laid, even though the witness had no recollection of the matters, even after having read them. The modern doctrine, at least in this country, seems to be that such documents are admissible in evidence, and that the court will not go through the useless ceremony of having the witness read a document relating to a fact of which he had no present recollection, except that he knew it was correct when made. The previous holdings of this court on the question do not seem to be in entire accord upon the question. See *Taylor v. Railroad Co.*, 80 Iowa, 431 (46 N. W. Rep. 64); *Bank v. Novack*, 97 Iowa, 270 (66 N. W. Rep. 186); *Adae v. Zangs*, 41 Iowa, 536. Without attempting to reconcile these cases, we think it sufficient to say that we are constrained to apply the modern—so-called American—rule to this case, and hold that the records were admissible. The evidence showed that the agent of the Chicago, Milwaukee & St. Paul, and the Wabash and Iowa Central Railroads kept a daily record of the tickets sold at his office, over the respective lines which he represented; that he was required to do so by a

rule or regulation of the several companies; that he kept the record introduced in evidence as "Exhibit 8," from March 24, 1893, to January 10, 1894. This record stated to what stations the tickets were sold, and the day of the sale. The agent of the Chicago, Burlington & Quincy Railroad testified that he used a machine in selling tickets over his line, in which there were two pieces of paper. This machine prints a ticket when called for, upon a piece of paper, and at the same time printed a stub, which was, in effect a duplicate of the ticket sold. This stub was sent in to the main office of the railway company, as a record of sales. He also testified that this machine printed a register at the same time. The witness presented this record made by the machine for the year 1893, printed upon the stubs before referred to, and it was introduced in evidence. This same witness was also agent for the Rock Island Railroad Company, and he testified that he personally kept a record of the tickets sold over this road during the year 1893, and that the record was correctly kept. This record was also introduced in evidence. Now, it is clear from this statement of the case that none of these witnesses could remember the number of tickets sold by them during the whole year, and it would be absolutely impossible for them to remember with certainty the places to which they sold tickets on any particular day. They would have to rely upon these records, which they identified. It is conceded that they might rely upon them, and might have read from them to the jury, although they may not have been able to remember a single sale. To use the language of Hamersley, J., in the case of *Curtis v. Bradley*, from the supreme court of Connecticut, reported in 28 L. R. A. 143 (31 Atl. Rep. 594): "It seems to us to be

to be read in evidence, while holding that the law forbids the admission as evidence of the paper which is the original and only proof of the statement admitted. In other words, it would seem as if, in admitting the paper to be read, the court, of necessity, admitted the paper as evidence, and therefore, by the concurrent authority of all courts, the paper is itself admissible." The learned judge further said: "All courts rightly hold that the thing used to refresh the memory is not, by reason of such use, itself admissible in evidence. When, in the application of the rule, a document like the one in question was presented to a witness, and absolutely failed to refresh his memory, its exclusion as a means of refreshing his memory became imperative, but the evidence of the document was so clearly essential to a fair and just trial, that its use in some form seemed absolutely imperative. Instead of treating the paper as itself competent documentary evidence, resort was had to a palpable fiction. The paper is read by the witness, and the knowledge the witness once had of the facts stated by the paper is imputed to him as still existing, and the statement of the paper is received as the testimony of the witness, and the paper itself—the only witness capable of making the statement—is excluded. The use of such a fiction in the administration of justice can rarely, if ever, be justified. It is certainly uncalled for in this instance. The principles of law involved to justify the fiction are amply sufficient to support—indeed, to demand—the admission of the document as evidence. There is no occasion to sacrifice truth in order to secure justice, as regards its admissibility as evidence. There is no substantial difference between this paper and any other tangible object capable of making a truthful and relevant statement." This reasoning is so cogent and logical that we adopt it as peculiarly applicable in

the case at bar, and need do nothing further than cite the following additional authorities in support of the rule: *Guy v. Mead*, 22 N. Y. 462; *Haven v. Wendell*, 11 N. H. 112; *Owens v. State*, 67 Md. 307 (10 Atl. Rep. 210, 302); *Donavan v. Railroad Co.* (Mass.) (33 N. E. Rep. 583); *People v. Dow*, 64 Mich. 717 (31 N. W. Rep. 597); 2 Rice Ev. pages 748-751. There was no error in the admission of this evidence.

VIII. The court, after specifically instructing the jury that the defendant was on trial for the one offense charged in the indictment, and no other, and that, if found guilty, it must be on this specific charge, concluded this paragraph of the charge as follows:

8 "You may and should, therefore, consider all evidence, if any there is, which tends to show that defendant had obtained other warrants from Wapello county by falsely representing that he had transported other paupers, to aid you in determining whether or not he falsely represented in this case that he had transported a woman calling herself Eliza Young, and her children, to Chillicothe, Mo., and whether or not such representations, if made by him, were fraudulently and falsely made, with the intent to obtain a warrant in this case." Complaint is made of this last sentence in the instruction. We have already sufficiently indicated our views with reference to this matter, and need only say that the word "falsely," as used in the instruction, manifestly meant something more than "mistakenly," or "untruly." The jury, in reading this instruction in connection with the others, could not fail to have construed the word to mean something designedly untrue or deceitful, and as involving an intention to perpetrate some fraud. This construction of the instruction was proper. The fourth instruction asked by the defendant, relating to the same matter, was properly refused because it practically withdrew all evidence as to

similar offenses, from the consideration of the jury. As sustaining the instruction, see authorities before cited, as well as the following case: *Commonwealth v. Blood* (Mass.) (6 N. E. Rep. 769).

The alleged misconduct of counsel for the state in his address to the jury is not considered, because not properly made of record. Other questions discussed by counsel are disposed of by what had already been said, and we conclude by saying that we discover no prejudicial error, and the judgment is therefore **AFFIRMED.**

FRANK TROKA, Appellant, v. THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

100	205
115	10
100	205
124	85

Fellow Servant: NEGLIGENCE. An employe operating a machine in 3 defendant's machine shops, is a fellow servant of a machinist engaged in placing shafting, though the same foreman did not have control over them.

NEGLIGENCE OF MASTER. If the master furnishes suitable trestles 1 and planking for the erection of a scaffold, to enable a fellow servant of plaintiff to place shafting, plaintiff, who was at work 2 near where the scaffold was erected, cannot recover for injuries received on account of a plank falling from the scaffold by reason 4 of the failure of the fellow servant to fasten it, whereby it slipped because of a ladder used to mount the scaffolding which was placed against it, instead of the trestle, though the ladder was crooked, and was so placed because it stood firmer, where there were other ladders the servant could have used, which were in perfect order.

Appeal from Cedar Rapids Superior Court.—HON. T. M. GIBBERSON, Judge.

THURSDAY, DECEMBER 10, 1896.

ACTION at law to recover for personal injuries alleged to have been caused by negligence on the part of the defendant. At the conclusion of the evidence for the plaintiff, the court sustained a motion of the

defendant for a verdict, and judgment for costs was rendered in its favor. The plaintiff appeals.—*Affirmed.*

Rickel & Crocker for appellant

S. K. Tracy for appellee.

ROBINSON, J.—In April, 1894, the plaintiff was an employe of the defendant, engaged in operating a bolt machine in its shops, at Cedar Rapids. Shafts, on which were fixed pulleys, for use in running various machines, were fastened near the ceiling of the room in which the plaintiff was at work. A machinist, named Wilde, in the employment of the defendant, was putting up a counter-shaft near the place where the plaintiff was operating his machine, and, to accomplish that purpose, used two trestles, on which were placed two planks. Each trestle was about four feet wide, and seven feet long at the base, two feet six inches wide, by three feet four inches long at the top, and thirteen feet high. The trestles were placed seven or eight feet apart, and each of the planks which rested upon them was ten or twelve feet in length, twelve inches in width, and one and three-fourths in thickness. They were laid on the tops of the trestles, three or four inches apart, and, with the trestles, constituted a scaffold on which the work of putting up the counter-shaft was being done. The top of the scaffold was reached by means of a ladder, eighteen feet in length, which was so placed that its upper end rested partially against the top of one of the trestles, and partially against one of the planks. Wilde was assisted in the work by an

needed, and by removing them, and in other ways. In rendering such assistance, he ascended and descended the ladder several times. At one time, while he was descending it, the end of the planks against which it was in part leaning, slipped off the trestle and fell, and the end of one of them struck the plaintiff on the back part of his head, as he was working at his machine, and inflicted a serious injury. For that he seeks to recover. The grounds of the motion for a verdict were stated as follows: "The injury is the result of a mere accident, and not caused by any negligence of the defendant; and if any one was negligent, causing the accident, it was the plaintiff's co-laborers and employes, for which defendant is not liable for damages to the plaintiff."

The motion is not based on negligence on the part of the plaintiff, and the case must be treated on the theory that he did not in any manner contribute to the accident of which he complains. It is the
2 well settled rule in this state, as it is at common law, that a master is not liable for personal injuries to a servant, caused by the negligence of a fellow servant, acting as such, while both are engaged in the same common employment. *Wilson v. Quarry Co.*, 77 Iowa, 430 (42 N. W. Rep. 360); *Peterson v. Mining Co.*, 50 Iowa, 673; *Sullivan v. Railroad Co.*, 11 Iowa, 421. See, also, 1 Shearer & R. Neg. section 180. Section 1307 of the Code, has created an exception in favor of employes of railway corporations when injured through the negligence of co-employes in the use and operation of any railway, but this case is not within that exception. The plaintiff, Wilde, and
3 Kouba were fellow servants, engaged in the same general employment. It is true that the plaintiff was not subject to the immediate supervision of the foreman who had control of the

other two, but that fact was immaterial. *Bier v. Railroad Co.* (Ind. Sup.) (31 N. E. Rep. 471).

It is urged by the appellant that this case does not fall within the rule stated, but is governed by the rule which requires the master to provide his servants with a safe place in which to work, and to furnish suitable machinery and appliances with which to do the work, and holds the master liable for injuries which result from his failure to perform that duty. There is no serious disagreement with regard to these rules, but the important question to be determined is, under which of them does this case fall? In *Fink v. Ice Co.*, 84 Iowa, 322 (51 N. W. Rep. 155), relied upon by the appellant, the plaintiff was injured by reason of defects in an ice slide and trestle-work on which he was employed. The plaintiff in *Haworth v. Manufacturing Co.*, 87 Iowa, 766 (51 N. W. Rep. 68, and 62 N. W. Rep. 325), was injured by reason of a defect in a platform on which he was working. The ice slide and trestle-work, in one case, and the platform used in the other, were furnished by the masters, who were charged with the duty of using reasonable care to make them safe, and the masters were held responsible for failing to perform that duty. In the case of *Railroad Co. v. Holcomb* (Ind. App.) (36 N. E. Rep. 39), it appeared that the defendant in error was injured while working for the railway company as car repairer, in consequence of the failure of the company to give notice of the approach of an engine on the track where he was at work. It was held to be the duty of the company to exercise reasonable care to make and keep safe the place where the car repairer was at work, and that the failure of its employees to give the required notice of

by the appellant, did not decide any question involved in this case; and that is true of the case of *Morton v. Railroad Co.* (Mich.) (46 N. W. Rep. 111).

The charge of negligence made by plaintiff is that the scaffold was negligently constructed, of materials which were not suitable or safe; that the defendant failed to furnish proper materials for it; that the planks were not properly fastened to the tops of the trestles to prevent slipping; that the ladder furnished was warped, crooked, and unsafe; that a young and inexperienced workman was placed upon the scaffold, without instruction with respect to the proper manner of using it,—“by reason of all of which the place of the plaintiff’s work was rendered unsafe, and plaintiff was endangered.” The evidence shows that the trestles were strongly built, and so heavy that four men were required to put them in place. They had been used about the shop for years, in putting up shafting, and in doing other work. The planks were new, of sufficient strength, and in good condition. The scaffold was made as had been customary for doing that kind of work, and no accident from its use in that manner had ever occurred before. It had been in use

about eight hours on the day in question before
4 the accident occurred. The only appliance used in connection with the scaffold which is claimed to have been defective was the ladder. That was selected by Wilde from several which were available for the purpose, and was set up by him. It was warped and a little crooked. Wilde, who testified in

it was so placed, at least partly, for that reason. The best and safest way to set the ladder was to lean the upper part wholly against the top or platform of the trestle, and there is no showing that it could not have been so set and used without difficulty. Had that been done, the accident could not have occurred. Wilde was an experienced mechanic, accustomed to putting up and repairing shafting, and he had charge of the scaffold and ladder. Kouba had never been on the scaffold before, but his duties while engaged upon it were merely those of a common laborer, and did not require any special preparation. It is argued that he should have been instructed in the proper use of the ladder, but it is not shown that he used it improperly. So far as the facts are disclosed by the evidence, the accident did not result from any defect in the trestles, planks, or ladder, nor from any failure to construct the scaffold properly, but from an improper and unnecessary setting of the ladder by Wilde. He was directed by the defendant to do the work in which he was engaged, but was not instructed in regard to the particular method in which it should be done. He caused the trestles to be set and the planks to be placed upon them in his own way, and selected the ladder in question. All the appliances thus used, belonged to the defendant, and were designed for any use to which they were adapted. They were well made, of good material, and in good condition, and, so far as is shown, were suitable for the use to which Wilde applied them, and were safe when properly used.

The conclusion is unavoidable that the accident was due to negligence on Wilde's part. It is true that if the planks had been properly fastened to the trestles, or had there been a barrier or other contrivance on the platform of the trestle, to prevent the slipping of the planks, the accident would not have happened. But it was not, however, the duty of the defendant to

furnish appliances for the use of its employes of such a kind that accidents would be impossible, but to provide those which, in the exercise of due care, could have been used with reasonable safety. *Young v. Mattress Co.*, 79 Iowa, 416 (44 N. W. Rep. 693). It was not necessary for the defendant to have anticipated the accident which happened, but to exercise reasonable care and diligence, in the light of all existing circumstances, to guard against accidents. *Beatty v. Railway Co.*, 58 Iowa, 248 (12 N. W. Rep. 332). If the scaffold and ladder had been properly used, they would not have made the place where the plaintiff was employed unsafe. It is true that the negligence of Wilde made that place a dangerous one, but it is also true, in the same sense, that every place in which an employe is injured in consequence of the negligence of a co-employe is made dangerous by that negligence. In *Neilson v. Gilbert*, 69 Iowa, 691 (23 N. W. Rep. 666), it appeared that the plaintiff and others were employed by the defendant as laborers in raising iron columns upon a building, and placing them in position with the aid of a derrick. One of the men so employed loosened a guy rope when it should not have been done, and, in consequence, the derrick fell, and struck and injured the plaintiff. It was contended by him that the derrick was improperly constructed, and that there was not a sufficient number of men to do the required work with safety; but this court held that the proximate cause of the accident was the loosening of the guy rope, which was negligently done by a fellow servant, and for that reason the plaintiff could not recover. In *Benn v. Null*, 65 Iowa, 407 (21 N. W. Rep. 700), it appeared that the plaintiff was injured by the fall of a scaffold on which he was at work for the defendant. The latter had furnished suitable material for it, and co-employes of the plaintiff selected material for and constructed the

scaffold without any direction from the defendant, and in his absence. It was held that the plaintiff was seeking to recover for the negligence of a co-employee, and that he could not recover. In *Cunningham v. Mills Co.* (Mass.) (26 N. E. Rep. 235), it appeared that the plaintiff was a mason, engaged in constructing the foundation for a machine, to be erected on the defendant's premises. A carpenter and his helper had erected a staging but a short distance away, to enable machinists to put up hangers and shafting. A block, or scantling had been placed but not fastened, on the top of a horse on which the planks were laid. When the machinists had finished their work, the staging was taken down. Two men, one a helper of the machinists, and the other a helper of the carpenter, dragged the horse away, and, in doing so, it was tipped, and the block fell upon the plaintiff's head. It was held, in effect, that the defendant was not liable for the accident, and that it was caused by the carelessness of the laborers in removing the staging. The plaintiff in *Van Den Heuvel v. Furnace Co.* (Wis.) (54 N. W. Rep. 1016), was injured by the breaking of a plank, over which he was helping to carry charcoal for the defendant, by whom he was employed. The plank had been selected by a fellow workman, from a pile of planks which had been furnished by the defendant for different purposes, including that for which the broken plank had been used. Some of those planks were strong enough for that purpose. It was held that the defendant was not liable, because the plank was selected by a co-employee of the plaintiff. In *Ling v. Railway Co.* (Miss.) (59 N. W. Rep. 378) it appeared

used for similar purposes, but was defective, and that fact would have been disclosed by a proper examination. It was held, that as the defendant had furnished proper and safe hooks, which might have been selected for use in raising the flue sheet, it was not responsible for the negligence of a co-employee of the plaintiff, in selecting a defective one. See, also, *Wood v. Heiges* (Md.) (34 Atl. Rep. 872).

The conclusion which the authorities require us to reach is that this case is not governed by the rule which controlled in the *Fink* and *Haworth Cases*, and in others of like character, but that the injury which the plaintiff sustained was caused by the negligence of a co-employee, for which the defendant is not liable. The superior court, therefore properly directed a verdict for the defendant, and its judgment is **AFFIRMED**.

THE COLLEGE OF PHYSICIANS AND SURGEONS OF KEOKUK
v. E. A. GUILBERT, *et al.*, Constituting THE STATE
BOARD OF MEDICAL EXAMINERS, Appellants.

100	213
1100	750
100	213
106	523
100	213
109	686
100	213
117	651

Venue: ACT UNDER COLOR OF OFFICE: *State board of health*. Said

- 1 board, while in session at Des Moines, made an order denying a college future recognition. The investigation leading to this action was made in Lee county. Code, section 2579, authorizes
- 2 action, as to matters done under color of office to be brought in any county in which the cause of action, or some part thereof, arose. *Held, certiorari*, to have said board compelled to recognize said college, must be brought in Polk, and cannot be maintained in Lee county.

Certiorari: JURISDICTION OF SUPERIOR COURT: *Construction of statute*. Under McClain's Code, section 769, which gives the superior court jurisdiction in *all civil matters*, with certain exceptions not including *certiorari*, said court can entertain *certiorari* proceedings, though said statute does not mention *certiorari*.

Appeal from Keokuk Superior Court.—HON. J. C. BURK,
Judge.

THURSDAY, DECEMBER 10, 1896.

THE plaintiff college is a corporation located in the city of Keokuk, in Lee county, this state. The defendants seven in number, are members of the board of medical examiners of the state, under appointment as provided by law. By section 1, chapter 104, Acts Twenty-first General Assembly, it is provided that "every person practicing medicine, surgery or obstetrics, in any of their departments within this state, shall possess the qualifications required by this act. If a graduate in medicine, such person shall present his or her diploma to the state board of examiners, for verification as to its genuineness. If the diploma is found genuine, and is issued by a medical school legally organized and in good standing, of which the state board of examiners shall determine, and if the person presenting and claiming such diploma be the person to whom the same was originally granted, then the state board of examiners shall issue its certificate to that effect, signed by not less than five physicians thereof, representing one or more physicians of the schools on the board, and such certificate shall be conclusive as to the right of the lawful holder to practice medicine, surgery, and obstetrics within this state." The petition shows, among other facts, that at the graduating exercises of said college, March 5, 1895, twenty-six students graduated and received their diplomas; that some of such graduates presented their diplomas to the defendant board, and that it refused to grant certificates to such graduates on the ground that the college issuing the diplomas was not in good standing; that the first intimation the management of the college had of the

intention of the board to refuse certificates to its graduates, was March 10, 1895, by a letter from the secretary of the board to the secretary of the college; that, prior thereto, and since the organization of the state board of examiners, it had always recognized the college as in good standing, and issued certificates to the holders of the diplomas; that on the twenty-eighth day of March, 1895, in the city of Des Moines, the defendant board, by resolution or otherwise, declared the plaintiff college not in good standing; and it is averred in the petition that the action of the board in refusing to recognize the diplomas and degrees issued by the plaintiff is illegal and without authority, upon grounds particularly specified therein. It is asked that the proceedings of the board be declared void, and that the diplomas of the plaintiff shall be recognized, with other relief. The petition was filed April 10, 1895, and a writ of *certiorari* issued to the defendants. Such proceedings were had that members of the board were arraigned for contempt, and a fine imposed for a refusal to obey the orders of the superior court. On the sixth day of May, 1895, the defendants appeared by counsel and moved to dismiss the action for want of jurisdiction, and, subject to the ruling on that motion, to transfer the case to Polk county; and both motions were overruled. Thereafter the defendants made return to the writ, and upon a final hearing, judgment was entered for the plaintiff, from which the defendants appealed.—*Reversed.*

Milton Remley, attorney general, and *D. F. Miller, Jr.*, for appellants.

John E. Craig, *James C. Davis*, and *A. Hollingsworth* for appellee.

GRANGER, J.—I. We have omitted many facts, important to the merits of the case, from the statement of facts. Some, not stated, important to the question of jurisdiction, will be noticed in connection with the particular questions to which they pertain. It will probably be necessary for us to consider—*First*, whether the action was brought in the wrong county; and, second, whether the superior court had

1 jurisdiction of the subject-matter. Upon the question of the county in which the action should be brought, it will be remembered that the action of the board sought to be vacated, and the refusal to recognize the diplomas, occurred in Des Moines, in Polk county. The action was brought in Lee county. The jurisdiction in such cases is fixed by Code, section 2579, the important part of which is as follows: "Actions for the following causes must be brought in the county where the cause or some part thereof arose. * * * (2) An action against a public officer * * * for an act done by him in virtue or under color of his office. * * *." Under the facts as we have given them, there could be no doubt that such an action must be brought in Polk county, for the alleged illegal acts that constitute the cause of action occurred in that county, and consequently the cause of action arose there. But it will be seen that the action may be brought in the county where the cause of action, or some part thereof, arose, and it is thought that some part of this cause of action arose in Lee county.

2 Some additional facts are important to determine that question. It appears that, prior to the action by the board, it consisted of five

which they embodied in a report, and the secretary of the board, who was one of the committee, mailed a copy of the report to each member of the board. In the letter transmitting the report to the members, the secretary said: "The college is now, and has been, regarded as in good standing by our board, and as secretary I am directed to issue certificates to the graduates of such colleges, unless there are reasons to suppose that our schedule of requirements has not been complied with." The secretary then asked, "in view of the report," whether he should issue the certificates, or withhold them until the next regular meeting of the board. The members all answered not to issue them. The letter was written by the secretary February 22, 1895, and the answers were all as early as March 6, 1895. The action of the board declaring the college not in good standing was March 28, 1895. The petition charges the acts of the committee, and those of the members in directing by letter the withholding of the certificates, as illegalities, which, with others, make the cause of action. Neither the doings of the committee to investigate the college, nor the acts of the members in directing a withholding of certificates till the regular meeting, were a part of the cause of action, within the meaning of the law under consideration. The petition, on its face, shows, taking its material averments as true, for the purpose of this question, and also taking as correct the conclusion that the board acted illegally, that the illegal acts giving rise to an action were those on the twenty-eighth of March, when the college was declared or determined not to be in good standing. The letters of the members were a mere temporary personal direction to the secretary, and their effect was superseded by the acts of the board thereafter. They were not a part of the proceedings of the board, nor were they intended as such. They had no relation

to the final action of March 28, and the effect, from that time, and when the petition was filed, April 10, could in no way be a cause of action or a part thereof. As to the appointment of the committee and its acts, if both for the purpose of this question, are conceded to be illegal, which we do not decide, they are not the illegalities that go to, or give rise to the cause of action. They were entirely harmless until the board attempted to use or act upon the report. If the board did not consider, or disregarded the report, the claimed illegalities were immaterial. It was the action of the board in considering the report, if it did so, that constituted the illegality, in the sense of its being, in whole or in part, a cause of action. The work of the committee did not, of itself, harm the plaintiff. It was its use by the board. The mere fact that an incompetent witness is brought into court, if not used, will not constitute an illegality going to the validity of the judgment. It is the use of the witness by the court. The same is true of a deposition illegally taken and filed in court. If not used, it is harmless. If used, the judgment may be avoided because of its use. And, in a review of the action of the court, the appellate tribunal would fix the illegality that would reverse the judgment in the use of the deposition, which would be the cause of complaint. So, in this case, the cause of complaint, or the illegality that must vacate the order, if it is to be done, is the action of the board in considering or acting upon the report. It is urged that the state board of examiners is state wide, and as much a resident of Lee as of Polk county. Admit the claim, and it does not affect the result. The jurisdiction does not depend on residence, but on the fact of where the cause of action arose. The law provides that the board shall hold meetings in different parts of the state, so as to best accommodate applicants; so that a

cause of action is liable to arise in any county of the state, and the jurisdiction is not confined to Polk county, except when the act constituting the cause of action occurred in that county. We conclude that the proper venue of the action is in Polk county.

II. Had the superior court of Keokuk jurisdiction? This question goes to the subject-matter. It is urged that the superior court is one of limited jurisdiction and without jurisdiction in *certiorari* proceedings. The jurisdiction of the superior court is fixed in the following language, being a part of section 769, McClain's Code: "Said court shall have jurisdiction in all civil matters concurrent with the district court as now and as may hereafter be provided by law, excepting probate matters and actions for divorce, alimony and separate maintenance. It shall have exclusive original jurisdiction to try and determine all actions, civil and criminal, for the violation of city ordinances, and all jurisdiction conferred on police courts as now or as may hereafter be provided by law; and concurrent jurisdiction with justices of the peace, and writs of error and appeals may be taken from justices' courts in the township in which the court is held, and by consent of parties from any other township in the county." It will be seen that it gives concurrent jurisdiction in "all civil matters," with the exceptions specified. The exceptions specified are plain and unequivocal, and, under the rule, they are to exclude others, unless there is something in the language of the act to indicate a different legislative intent. The term "civil matters," as used in the act, is evidently intended to include all matters other than criminal; for, of the two, it is a more comprehensive expression than "civil actions," which is a term used in the Code, and defined in a way to limit its meaning. Code, section 2505. "Civil cases" is a term defined in the Code, and includes

actions and special proceedings. Code, section 2504. The term "civil matters" must be as broad in meaning as "civil cases." And, if so, it includes actions and special proceedings. In *Thompson v. Reed*, 29 Iowa, 117, it is held that *certiorari* is a special proceeding. Turning again to the act conferring jurisdiction on the superior court, we find nothing in the remaining language quoted to in any way change the effect of the general language giving jurisdiction. Its jurisdiction is concurrent in all civil matters, with the exceptions stated. The act then confers on the superior court exclusive jurisdiction in some particulars, and gives it concurrent jurisdiction with justices of the peace, and permits appeals to it from justices in the township. While the object of the proceeding is to review other proceedings, and to modify, revise, or correct, as the law requires, it is not an appeal, but a remedy where one does not exist by appeal, or under forms of the law. We conclude that the superior court has jurisdiction in such cases.

Because of our conclusion that the proper venue of the case is in Polk county, the motion to transfer to that county should have been sustained. The judgment is reversed, and the cause is remanded, with instructions to order the change.—REVERSED.

ELY LICHTENBERGER V. THE INCORPORATED TOWN OF
MERIDEN, Appellant.

100	221
124	690
100	221
130	720

Contributory Negligence: JURY QUESTION: *Sidewalks.* Whether plaintiff, in an action against a municipal corporation, for negligently leaving, without proper guards, an opening in a sidewalk near which he was standing while talking to a friend, was guilty of contributory negligence in stepping backwards into the opening to get out of the way of a passing pedestrian, is a question for the jury, to be determined under all the circumstances attending the accident.

Appeal from Cherokee District Court.—HON. SCOTT M. LADD, Judge.

THURSDAY, DECEMBER 10, 1896.

ACTION at law to recover for personal injuries alleged to have been caused by negligence on the part of the defendant. There was a trial by jury, and a verdict and judgment in favor of the plaintiff. The defendant appeals.—*Affirmed.*

Argo & McDuffie and J. D. F. Smith for appellant.

Ernest C. Herrick for appellee.

ROBINSON, J.—The defendant is an incorporated town in the county of Cherokee. On the sixth day of May, 1891, the plaintiff fell into a cellarway in a sidewalk of the defendant, and received the injuries of which he complains. The accident occurred at the store building of G. W. Prescott. That fronts eastward on a street which extends from north to south. The sidewalk at that point is eight feet wide. Between the front door and the south side of the building an opening for a cellarway was cut through the sidewalk.

It extended from the building four feet into the walk, and was provided with a cover or door hinged on the south edge. When the door was closed, it was level with, and formed a part of, the walk; and, when it was open, it was perpendicular to the walk, and was hooked to the corner of the building, thus forming a barrier on the south side of the opening. When the door was open, a barrier on the north side was commonly formed, by placing there a shoe box and a joist six feet in length. The front of the opening was not protected. At the time of the accident, the plaintiff stood between the opening, which was uncovered, and the east edge of the sidewalk, facing eastward, conversing with an acquaintance. Prescott came out of the building, and turned southward, passing between the two. The plaintiff states that he stepped backward, to permit Prescott to pass, and fell into the opening, to the floor of the cellar, a distance of not quite five feet. He claims to have sustained permanent and serious injuries from the fall. The amount allowed by the jury for which judgment was rendered was two thousand six hundred twenty-five dollars.

I. There is conflict in the evidence, with respect to the use of the opening, in regard to barricades, when it was uncovered, and the direction from which the plaintiff approached it before the accident. His place of business was about fifty feet further north, on the opposite side of the street. Evidence on the part of the defendant tends to show that he crossed the street diagonally from his shop to Prescott's store, and that he must have seen the opening when he reached the sidewalk. He testifies that he went southward, on the east side of the street, until opposite the bank, which was one hundred feet south

street. After talking with the owner a few minutes, an acquaintance came up, with whom he conversed, at the same time watching his shop, to see if any one went into it. While he was so employed, Prescott came out of the store, as already stated. The plaintiff says, that Prescott "crowded right in between us, and I stepped back, to let Prescott pass; and, when I done so, I fell into the cellar." He states, positively, that he did not know that the cellar was open; that, as he approached the building from the south, he saw a box, barrel, door, or something else against the building; but that it was common to see boxes or barrels in that place, and he did not pay any attention to what was there. The cellarway was made about two years before. It is claimed by the defendant, that it was rarely opened, and then only for actual use, and that, when it was open, it was carefully protected. There is testimony on the part of the plaintiff, that it was frequently open, and that it was not always protected when it was open. We had occasion to consider this case on a former appeal. 91 Iowa, 46 (58 N. W. Rep. 1058). That involved the ruling of the district court in directing a verdict for the defendant, and we held that it was erroneous. The ruling involved two propositions: (1) That the evidence for the plaintiff did not show that the defendant was negligent; and (2) that it showed that the plaintiff was guilty of contributory negligence. We held, in effect, that both propositions should have been submitted to the jury. Our holding on that appeal must be followed now, so far as it is applicable. The evidence for the plaintiff was substantially the same on the second as it was on the first trial, and the evidence for the defendant submitted on the last trial merely created a conflict in the evidence, which the jury was required to decide. Nearly all the cases cited by the appellant and the material points pressed,

in argument were considered on the former appeal, and need not be reviewed here. There was evidence of negligence on the part of the defendant. Whether the plaintiff, knowing of the opening, was negligent in not having it in mind when he stepped into it, or whether, having knowledge of it, his mind was diverted from it by circumstances which would have diverted the attention of a reasonably prudent person, were questions properly submitted to the jury; and the evidence was sufficient to authorize a verdict for the plaintiff.

II. It is said that the amount allowed by the jury is not warranted by the evidence. The nature and extent of the injuries sustained by the plaintiff were the subject of much controversy in the district court. If the testimony offered in his behalf was credible, he sustained injuries, both mental and physical, of a very serious and permanent character, which fully authorized the recovery of the amount for which judgment was rendered. We cannot say that the testimony so offered was not credible.

Most of the material questions discussed in argument were determined on the former appeal. We do not find anything which affords sufficient ground for disturbing the judgment of the district court. It is, therefore, **AFFIRMED.**

STATE OF IOWA V. ROBERT SYLVANUS HATHAWAY, *et al.*,
Appellants.

Opinion Evidence: VALUE. Where the articles stolen consisted of a trunk, containing the family wearing apparel, the wife of the

- 1 prosecutor, having testified that she knew the value of the articles, is competent to testify as to such value, though she may not have known the value in a second-hand store or at public auction.

Instructions: OBJECTIONS: Request. The judgment of a trial court in a criminal case will not be reversed for error in instructions,

- 2 where objection was not made and exception taken at the time; nor for failure to give instruction, where no request for such instruction was made at the time, unless it appear that such failure deprived the defendant of a fair trial.

Objection to Charge. An objection made in a motion for a new trial, to a portion of a charge as given, is insufficient to raise the question as to whether the trial court erred in not giving an additional

- 3 charge on the same subject, not asked, but to which the accused was entitled.

Exceptions: NUNC PRO TUNC ORDER: Order in vacation. An order entered in a criminal case in vacation, six months after judgment,

- 4 reciting that the record did not show that exception had been taken to the instructions given, and that exceptions should therefore be entered as of the date of the instructions, is unauthorized, and of no effect.

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

THURSDAY, DECEMBER 10, 1896.

THE defendants, Robert Sylvanus Hathaway and William Jacob Palmer, were convicted of the crime of larceny, and from the judgment, which required them to be imprisoned in the penitentiary at Fort Madison for a term of years, they appeal.—*Affirmed.*

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100	225
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100	225
108	72
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109	117
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110	362
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111	258
100	225
112	608
100	225
115	101
100	225
117	157
117	544
100	225
123	142
100	225
127	327
100	225
131	219
100	225
132	184
100	225
135	154
135	722
100	225
137	503
100	225
139	50
140	474

T. D. Hastie for appellants.

Milton Remley, attorney general, *James A. Howe*, county attorney, and *Jesse A. Miller* for the state.

ROBINSON, J.—The indictment charges the defendants with larceny of property, of B. T. Kent, of the value of fifty dollars. The defendants pleaded not guilty to the charge, but the jury found them guilty, and fixed the value of the property stolen at twenty-five dollars. That the defendants were guilty of stealing the property in question is not denied in this court, but it is insisted that its value is less than twenty dollars, and that they were convicted of a higher degree of the offense charged than that of which they were guilty.

I. Mrs. Alice Kent, the wife of B. T. Kent, testified that the property stolen included a trunk and its contents, which consisted of numerous articles of wearing apparel, and that its reasonable market value was about fifty dollars. The defendants moved to strike out her testimony, on the ground that she was not shown to be competent to testify to the value in question, but the motion was overruled. We
1 are of the opinion that the ruling was correct. The clothing belonged to herself and husband, had been used by them and their children, and she was entirely familiar with it. She testified that she knew its value, and, although she may not have known what it would sell for in second-hand clothing stores, nor at public auction, the facts shown in regard to her knowledge justified the presumption that she knew its fair market value, and made her testimony competent. *Tubbs v. Garrison*, 68 Iowa, 48 (25 N. W. Rep. 921). She showed a greater knowledge of the actual value of property than did two dealers in second-hand clothing who testified for the defendants,

and her testimony was more satisfactory than theirs. The evidence justified the jury in fixing the value of the property stolen at twenty-five dollars.

1. The only instruction given by the court in regard to the method of fixing the value of the property, was as follows: "(5) If you shall find the defendant guilty of the larceny of the goods described in the indictment, or some part thereof, it will become your duty to determine the market value of the property which you shall find they thus stole. By the words 'market value,' as here used, is meant the price or prices at which the property could ordinarily be bought and sold, by or between persons who would ordinarily buy and sell such goods for cash, or trade at an equivalent for cash. In determining such value, you are not necessarily confined to the price at which dealers in second-hand clothing would buy or sell the property, but you should ascertain and return the sum which you shall find, upon a consideration of all the facts shown in the evidence and the evidence of all the witnesses, to be the reasonable market value thereof, as above defined." The appellants suggest that this instruction is erroneous, in not confining the jury to a consideration of the testimony as to value given by the dealers in second-hand clothing. We have already stated that the testimony of Mrs. Kent, as to the value, was competent, and the instruction is not erroneous in the particular in which it is questioned. We do not understand the appellants to claim that it was erroneous in any other respect, but they contend that the court erred in not charging the jury that, if it had a reasonable doubt as to whether the value of the property stolen was more than twenty dollars, they should find it to be twenty dollars or less. That it was the right of the defendants to have had such an instruction given is well settled. *State v. Wood*, 46 Iowa, 117; *State v. McCarty*,

73 Iowa, 51 (34 N. W. Rep. 606); *State v. Neis*, 68 Iowa, 469 (27 N. W. Rep. 460); *State v. Jay*, 57 Iowa, 164 (10 N. W. Rep. 343); *State v. Walters*, 45 Iowa, 390. No instruction in regard to value was asked by the defendants, and it is claimed on the part of the state that no exception was taken to the charge given, and, therefore, the defendants cannot rely upon the error of the court to secure a reversal. It is the general rule, applicable in criminal as well as in civil cases, that the judgment of the trial court will not be reversed for an error in giving, or failing to give instructions to the jury, where objection to the error is not made and exception taken at the time it is committed. *State v. Callahan*, 96 Iowa, 304 (65 N. W. Rep. 150); *State v. Moran*, 7 Iowa, 238; *State v. Hussey*, Id. 411; *State v. Reasby*, 100 Iowa, *post* (69 N. W. Rep. 451. It is true that section 4538 of the Code requires this court to determine appeals in criminal cases without regard to technical errors or defects which do not affect the substantial rights of the parties; but the failure of a defendant to object to an instruction at the time it was given cannot be regarded as a technical error of the kind contemplated by that section. Had the error in question been called to the attention of the court, it would no doubt have been corrected; but the only objection

3 which the record shows to have been made to the charge is set out in the motion for a new trial in the following words: "The court erred in giving the fifth instruction as given by the court." That did not suggest that the error was one of omission, but rather that the instruction was erroneous in its statement of the law. It is the right of both the state and the defendant in a criminal case, to ask instructions to the jury. Code, section 4440. And when those given are not erroneous, the judgment of the district court will not be reversed for a failure to give

instructions not asked, unless in an exceptional case, when this court is satisfied that the failure to instruct properly has deprived the defendant of a fair trial. *State v. Helvin*, 65 Iowa, 291 (21 N. W. Rep. 645). We are not satisfied that justice has not been done in this case. The defendants were represented in the district court by a competent attorney, the jury was instructed in regard to the method of fixing the value of the stolen property, and its verdict appears to have been fully authorized by the evidence.

III. It is claimed by the appellants that exceptions were duly taken to the instructions, and to support that claim they rely upon an order of which a copy is as follows: "Be it remembered that on this
4 twenty-fourth day of August, 1896, it appearing to the court that the records in the above-entitled case do not show that the defendants have an exception to the instructions given by the court, and that the defendant did take exception to each and all instructions at the time they were given. It is therefore hereby ordered that said exceptions be entered of record as of the date on which said instructions were given. C. P. Holmes, Judge of the District Court, Polk County, Iowa." This order was made in vacation, more than six months after the judgment was rendered. Without deciding that, had exception been taken as recited in the order, it would have been sufficient to present the objection upon which the defendants rely, we state our conclusion to be that the order we have set out is without legal effect. The statute provides for the correction of errors in the court records. The clerk is to read in open court all the entries made of record, and, when correct, they are to be signed by the judge. Code, section 176. When records cannot be prepared and approved during the term, they may be read, corrected, and approved at the next succeeding term. Entries authorized to be

made in vacation, shall be read, approved, and signed at the next term of the court. Code, section 177. These records are under the control of the court, and may be amended, or any record therein expunged, at any time during the term at which it is made or before it is signed by the judge. Section 178. And entries made, approved, and signed at a previous term can be altered only to correct an evident mistake. Section 179. These provisions, although they do not refer to exceptions to instructions, show the policy of the law in regard to the keeping and correction of court records. They are to be read and approved by the judge in open court, and not in vacation. Section 183, provides that, "with consent of parties, actions, special proceedings, and other matters pending in the courts [district] named in this chapter may be taken under advisement by the judges, decided and entered of record in vacation, or at the next term; if so entered in vacation they shall have the same force and effect from the time of such entry as if done in term time." But the order in question does not appear to have been made in a matter taken under advisement with the consent of the parties, nor on notice to the adverse party. Judges are empowered to make certain orders in vacation, but our attention has not been called to any provision of the law which authorized the order in question. It appears to have been made by a judge in vacation without jurisdiction. It was made too late to serve as a bill of exceptions. *State v. Newcomb*, 56 Iowa, 335 (9 N. W. Rep. 290). As a *nunc pro tunc* order it is without effect, for the reason stated. We are satisfied that substantial justice has been done in this case, and the judgment of the district court is **AFFIRMED**.

STATE OF IOWA V. NOAH REASBY, Appellant.

Criminal Law: IDENTIFICATION OF DEFENDANT BY STANDING UP.

During the trial of a criminal case, the defendant's brother, who
 1 greatly resembled him, took a seat by his side, as a test of identity.
 At the request of the attorney for the state, the judge ordered the
 defendant to rise for identification, against the objection of his
 attorney. The prosecuting witness then identified the one who
 stood up as the one who committed the offense charged. *H. id.*,
 that the action of the court in compelling the defendant to rise
 was not error, as compelling him to criminate himself. Neither
 was it an abuse of discretion to refuse letting defendant make the
 test attempted by him.

Evidence: CONNECTING DEFENDANT. On a trial for robbery, it appeared
 that the prosecuting witness had gone to a pump near the railroad
 3 track, to draw water for his stock; that two colored men had come
 up and asked if they should not fill the trough. Witness gave per-
 mission, and started across the track. When part way across, he
 looked back, and saw the two men just behind. A moment later,
 he was struck on the head, knocked insensible, and robbed. He
 identified the defendant as one of the two men, and three other
 witnesses, who saw the two colored men talking to witness at the
 pump, also identified defendant as one of them. *Held*, that the
 evidence was sufficient to connect defendant with the crime.

INCLUDED OFFENSES: Charge on. On a trial for robbery, where there
 8 was no evidence tending to show that the offense might have been
 4 larceny, it was not error to fail to instruct as to such offense.

Objection Below: Assignment of errors. An assignment of errors
 based on the instruction of the trial court, will not be considered
 4 unless exception was properly taken below.

Appeal from Mahaska District Court.—HON. A. R.
 DEWEY, Judge.

THURSDAY, DECEMBER 10, 1896.

THE defendant, Noah Reasby, was convicted of
 the crime of robbery, and from the judgment, which
 required him to be imprisoned in one of the peniten-
 taries of this state for the term of fifteen years, he
 appeals.—*Affirmed.*

100	231
100	238
100	231
109	117
109	143
100	231
117	492
117	690
100	231
118	500
100	231
126	322
100	231
140	473

Byron W. Preston and J. C. Williams for appellant.

Milton Remley, attorney general, and *Jesse A. Miller* for the state.

ROBINSON, J.—In the evening of the fourth day of July, 1895, Henry Galliers was struck on the head, and made insensible, and several dollars in money were taken from his pocket. The injury was so severe that he did not recover consciousness for two or three weeks. The defendant, Reasby, and one Lud Struther, were jointly indicted for the offense. Reasby was tried separately, and convicted, as stated.

I. During the trial of the defendant, and while Galliers was on the witness stand, but before he was asked who the persons he claimed to have been present at the time of the robbery were, an attorney
1 of the defendant caused a brother of the defendant to sit by him, as a test on the question of identity. An attorney who was assisting at the trial in behalf of the state, whispered something to the presiding judge in regard to the defendant's brother being the defendant, and stated aloud that they had changed places. An attorney for the state then asked the court to require the defendant's brother to retire, or to cause the defendant to rise for identification, and the court thereupon directed the defendant to stand. An attorney for the defendant at once objected, stating that he would stand up for the defendant, but the court ordered the defendant a second time to stand, and he arose. The county attorney then stated, "That is not the man." The defendant sat down, and, Galliers being asked if he could identify the man, "stated that he could, and that the man who stood up was the man," We understand this to mean

that the witness said that the man who arose was one of those who were present when the robbery was committed. The appellant contends that the order of the court was erroneous, because it compelled him to criminate himself. It is certainly proper for the court to require the defendant who is accused of felony, and who is present at his trial, to make himself known. When the objection in question was made, an attorney for the state, in response to it, referred to the defendant and his brother as looking very much alike, and we are justified in concluding from the experiment attempted by the defendant that there may have been such a resemblance. The court appears not to have known who the defendant was, and had the right to cause him to identify himself. The fact that he was accused of the crime was not evidence of guilt, and to require him to stand in the presence of the witness and jury, did not compel him to furnish evidence of his guilt. We are not aware of any rule of law which entitles the defendant, in a criminal case, to remain concealed during his trial, lest his presence might aid in his identification. Yet, the rule contended for by the defendant, carried to its logical conclusion, would lead to that result. It is a very common practice to refer witnesses for the state, in a criminal case, to the defendant, and ask questions concerning him and his alleged offense, and it often happens that a witness is able to testify more particularly, and that the jurors are able to understand more readily, the defendant's connection with the crime charged, by reason of the fact that they see him, and in consequence are better able to apply the evidence to him, and to judge of its value. But where that is done, the defendant does not furnish evidence to criminate himself. This case is unlike one where the

some mooted question, and thus furnish evidence which would tend to connect him with the crime of which he is accused. What the rule applicable to such a case is, we have no occasion to determine. The object which the defendant had in view, was really to test the ability of the witness to identify one of his assailants, and it would have been within the power of the trial court to permit the test to be made. But in refusing to allow it, the discretion of the court was not abused.

II. It is urged with great apparent confidence that the evidence is not sufficient to authorize a conviction of the defendant. No witnesses testified to having seen the robbery in question, but the evidence which connects the defendant with it is substantially as follows: Between 7 and 8 o'clock on the evening of the day on which the robbery was committed, Galliers went to a pump, about two hundred yards from the house in which he was living, to water some calves. The pump was twenty-five yards west of a fence on the west side of a railway, and thirty-nine yards west of the center of the track. The calves were to be watered at a gate in a fence ten yards east of the center of the track. Galliers filled his bucket, and, as he was about to leave the pump, two colored men came to him, and asked if they should not fill the trough. He gave them permission to do so, and started with his bucket, in a northeasterly direction, to a gate in the west fence, and then went eastward across the track to the east gate. When he was a few feet east of the track he looked back and saw that the two men were following him, and that they were together in the center of the track. Not suspecting harm, he went on, and about that time received a blow, as stated. It was evidently inflicted by a person who stood behind him, with a club which was found near the spot. When he fell,

he had three or four dollars in silver money in his pocket, and when he was found, a few minutes later, his pocket was turned inside out, and his money was gone. He does not remember anything that occurred after he had passed the railway track four or five yards, although the bucket was standing near the gate, and he was attempting to climb over it when found. He had seen the two men referred to pass along the railroad track frequently, and is positive that the defendant is one of them. Robert Fisher, a boy twelve years of age, a nephew of Galliers, followed him to the pump, and when he reached it Galliers had left it with his bucket of water, but the two men were there. As he passed them, they spoke to him, and he went on for some cattle. When he was some distance away, they called to him that his uncle said that he should get the cattle. He saw the men start after Galliers, but went on without again looking back, and was soon out of sight. He had known the men for about a year, although he had not spoken to them before, and stated that the defendant was one of them. Two young ladies—Mary Watson and Annie Fisher—passed along the track, near the pump, when Galliers was there, and saw two colored men talking with him. Miss Watson states that she had seen the defendant frequently, and knew him, and that he was one of the two men who were talking with Galliers. Miss Fisher had seen the men several times before, and states that the defendant was one of them. After the crime was committed, the defendant and Struther were accused of being guilty of it, and were arrested. After that had been done, the defendant told the constable who arrested him that neither he nor Struther had anything to do with the robbery; that he and one Sam Carter were going up the road together, when Carter told him of a plot to knock Galliers on the head; that they were then near the pump, and Galliers was there; that the

defendant said he would not have anything to do with the matter, and went on up the road; that when he was seventy-five or eighty yards away he looked around, and saw Galliers crossing the road with a bucket of water, and saw Carter hit him twice with a club, and then go through his pockets. The defendant further stated to the constable that Carter said he had a coupling pin hidden, which he intended to use on Galliers, and that he tried to induce the defendant to join him in the venture, but that the defendant refused, and that he did not think at the time that Carter would attempt it. He also told another officer that Carter committed the act, and that he was there on the railroad track when it was done. There were a few other circumstances we have not mentioned, which tend to connect the defendant with the crime. He did not testify, but it is claimed in his behalf that, as the state proved his statements to the constable, it is bound by those which tended to show that he is innocent of wrong. But that is not correct. The statement was made to shield the defendant, and the jury were not required to believe more of it than seemed to be credible. It showed that the defendant knew of the crime, and that he saw it committed. If the witnesses for the state told the truth, he could not have been many yards from Galliers when he was stunned and robbed, but must have been close by, if he did not actually participate in the robbery. He and his companion were close together, and but a few steps behind Galliers, only a few moments before the latter was hit, and it was not possible for the defendant to have been where he claims that he was at the time. The evidence does not show who held the club when it was used on Galliers, but it shows that the act was premeditated, and that the defendant

actually used the club, he was close by, to aid and abet the one who did use it. There is testimony which tends to weaken some of the positive statements made by witnesses for the state, but it was the province of the jury to weigh the conflicting statements, and decide the truth of the matters in controversy. We are of the opinion that their verdict has sufficient support in the evidence.

III. The sections of the Code under which the defendant was convicted are as follows:

"3858. If any person with force or violence, or by putting in fear, steal or take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense as is provided in the following two sections."

"3859. If such offender at the time of such robbery is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed, or if being so armed he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery present and so armed, he shall be punished by imprisonment in the penitentiary for a term not exceeding twenty nor less than ten years."

The crime of robbery, as defined in these sections, includes larceny, and a person indicted for the former might be convicted of the latter offense. *State v.*

Mikesell, 70 Iowa, 178 (30 N. W. Rep. 474); *State*
3 *v. Graff*, 66 Iowa, 482 (24 N. W. Rep. 6). Other

offenses are also included in robbery. It is the right of a defendant who is being tried for an offense which includes other offenses of lower degrees to have the jury instructed with regard to the included offenses of which there is evidence. *State v. Hathaway*, 100 Iowa, 225 (69 N. W. Rep. 449). But in this case the jury was not so instructed, and of that omission the appellant complains. Among the grounds for a

new trial in a criminal case, are the following: "(5) When the court has misdirected the jury in a material matter of law." "(7) When the court has refused properly to instruct the jury." Code, section 4489. It is the duty of the court to charge the jury in writing. Section 4420 (7). It is also the duty of the court to instruct the jury on the motion of either
4 party. Section 4440. It is the general rule, however, when the court does charge the jury in regard to the issues which it is required to determine, that to enable the defendant to take advantage of an error in the charge he must object to it. See *State v. Hathaway, supra*. We have examined not only the abstracts, but the transcript submitted in this case, without finding anything to show that the defendant excepted to the charge as given. It may be said in support of the charge as given by the court that there was nothing in the evidence to justify the conviction of the defendant of any lower offense than that of robbery. If he was at the place of the robbery at the time it occurred, the presumption is, in the absence of proof to the contrary, that he was there as a participant in the crime, and guilty in law of all that
5 was done. It is not error to omit to charge the jury in regard to an offense of a lower degree which is included in that with which the defendant is charged, but of which there is no evidence. *State v. Sterrett*, 80 Iowa, 612 (45 N. W. Rep. 401); *State v. Perigo*, 80 Iowa, 43 (45 N. W. Rep. 399); *State v. Munchrath*, 78 Iowa, 277 (43 N. W. Rep. 211); *State v. Casford*, 76 Iowa, 332 (41 N. W. Rep. 32); *State v. Row*, 81 Iowa, 147 (46 N. W. Rep. 872). We conclude that the defendant cannot justly complain of the omission to charge the jury in regard to other offenses than that of which he was convicted.

discussed others, which are not of sufficient importance to be set out in detail. It is sufficient to say, that the defendant has had a fair trial, and that he has no legal ground of objection to the judgment of the district court. It is therefore **AFFIRMED**.

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1134	457

RICHARDSON & BELL BROTHERS V. ARCHIE DOUGLAS, Appellant.

Evidence: SECONDARY AND BEST. A witness, even though shown to be familiar with the printed instructions contained in the catalogue furnished by the manufacturers of an engine, as to its management, cannot testify as to what such instructions are, since, even, if such instructions are competent to be received, the catalogue itself is the best evidence of them.

EXPERT EVIDENCE: Machinery. Plaintiff's grain was destroyed by fire set by sparks from defendant's engine, operating a threshing machine. A witness testified that he had run an engine for about forty years; had operated the engine in question a little; that he had run similar engines, but never for threshing grain. *Held*, that the witness was competent to testify as to the appliances necessary to keep sparks from escaping from such engine.

HARMLESS ERROR. A witness testified that, shortly after the fire, he examined the smokestack of defendant's engine, and did not find any appliance for arresting sparks. *Held*, that in view of testimony that, between the time of the fire and the time the witness examined it, the spark arrester had been taken off, the admission of the testimony complained of was not prejudicial.

Contributory Negligence. One who employs another, having an engine and threshing machine, to thresh for him, is not guilty of such contributory negligence as to bar recovery for a loss of his stacks through a fire due to the negligence of the employes of the owner of the engine, in not having it provided with proper spark arresters, because he, in ignorance of such fact, designated a place for the setting up of the engine, which is actually dangerous, but which such employes assure him is safe.

ACTION at law, to recover the value of oats owned by the plaintiffs, alleged to have been destroyed by reason of negligence on the part of the defendant. There was a trial by jury, and a verdict and judgment for the plaintiffs. The defendant appeals.—*Affirmed.*

T. B. Perry and *N. E. Kendall* for appellant.

Wm. A. Nichol for appellees.

ROBINSON, J.—In July, 1894, the defendant was operating a steam threshing machine, and was employed by the plaintiffs to thresh for them several stacks of oats. For that purpose, the machine was set in the stack yard, and run for a short time, when work was suspended, and all the persons engaged in it left the yard to eat their noonday meal. They had proceeded but a short distance from the stacks when one of them was discovered to be on fire, and, before it could be extinguished, all the oat stacks and the separator were destroyed. The engine was saved, but, the next day, while it was being moved to another place, it fell from a bridge, and was somewhat damaged by the fall. The plaintiffs allege that the fire was caused by the negligence of the defendant in not using a screen spark arrestor; in operating the engine with an open smokestack, without any appliance to prevent the escape of sparks and fire; in failing to have a careful and competent person to operate the engine; in negligently so setting the engine that the sparks therefrom blew onto the stacks; in not removing the combustible materials from the ground under and around the engine; in making a hot fire in the engine, and not leaving any one in charge of it; and in not using any means to prevent the escape and spread of the fire. The defendant denies negligence on his part, and alleges that, if he was negligent, the

plaintiff's were guilty of contributory negligence, and directed that the engine be placed where it was finally located, and knew of the alleged negligence of the defendant.

I. The appellant complains of the admission of the testimony given by A. P. Mintonye, on the ground that he was not shown to be a competent witness. He stated that he had had experience in running
1 an engine about forty years; that he had purchased the engine in question for his son, and operated it somewhat; that he had run similar engines twelve or fourteen years; that he had run engines for steam threshers, although he had never run one for threshing grain; that he had examined the engine in question, and had helped to overhaul and repair it, and knew its construction. He was then asked: "What appliances are necessary, in such an engine as this, to arrest the escape of sparks from the smokestack?" An objection to the question was overruled, and the witness described an appliance, called a "baffle plate," which is a perforated plate of iron so placed, under the smokestack, and in front of the flue of the engine, as to regulate the draught of air through the flues, and cause the sparks from the fire-box to strike it and fall into a receptacle below. He also spoke of an additional screen, but said it was not generally used, on account of clogging. He was then asked: "Suppose the "baffle plate is taken out, and there is no screen in the smokestack; what is the likelihood of sparks being thrown out, in ordinary work, from the smokestack?" An objection to the question was overruled, and the witness answered that, if the fire was in light condition, and there was nothing to prevent, the sparks would sometimes go out, and sometimes fall below. Another question, of a similar character, was asked and answered, and the witness was permitted to state the effect of the blower upon

the drafts. We are of the opinion, that the district court was right in permitting the questions to be answered. The fact that the witness had never operated an engine while it was running a separator, did not disqualify him to tell the facts which he knew, from long experience, in regard to sparks thrown from stationary engines, similar to that in question, and the means which might be adopted to prevent their escape. It is not claimed that sparks escape more freely from such an engine, while it is being used to run a separator, than while it is used to run a wood saw, or do other work. The degree of competency shown by the witness was sufficient to justify the admission of his testimony, and its value could have been tested upon cross-examination, or by other recognized means.

II. A baffle plate belonged to the engine of the defendant, but whether it was in its proper place at the time of the fire was a disputed question. The plaintiffs offered testimony to show that it was not, and among the witnesses who were examined in regard to its condition was Alexander Chisholm. He saw the engine of the defendant after it had fallen from the bridge, and was permitted to state that he did not find any appliance for arresting sparks from the top of the smokestack, and did not see a baffle plate.

2 Of that the appellant complains on the ground that the engine was not in the condition, when Chisholm saw it, that it was at the time of the fire. That is true, but the testimony for the defendant shows that he did not use the cone screen for the smokestack, and that the baffle plate was taken out after the fire, and not replaced, and that it was broken by the fall from the bridge. Therefore the defendant could not have been prejudiced by Chisholm's testimony on that point. Some objection is made to his

competency to testify in regard to certain other matters, but, we think, without sufficient grounds.

III. A witness for the defendant was shown to be familiar with the illustrated and descriptive catalogues furnished by the manufacturers of the engine in question, and he was then asked if they did
3 not give certain instructions, which were included in the question, for the management of their engines. An objection to the question was properly sustained. It referred to printed instructions, which, if competent, should have been introduced as printed. Whether they were competent evidence for any purpose, we do not decide.

IV. The appellant complains most of a paragraph of the charge of which the following is a copy: "(18) If you find that there was no baffle plate in the engine while the same was being operated when the fire occurred, and that, in view of the direction of the wind, and dryness of the oats, and other circumstances under which it was being operated on that day, it was negligent to so operate it, and find that there was no danger, and the fire would not have occurred, had said engine been operated with the baffle plate, with coal for fuel, when the wind was blowing from the engine towards the oats stack while they were operating it, and the plaintiffs did not know that it was being operated without a baffle plate, then the plaintiffs would not be guilty of contributory negligence in requesting
4 it to be located as it was located on that day, if you find they did request it." Some of the evidence tends to show that the employes of the defendant in charge of the machine at the time of the fire desired to set it in such a manner that the wind would not have blown from the smokestack of the engine towards a certain stack of oats, and that the plaintiffs requested that it be set as it was. But the mere fact that the

engine was set where the plaintiffs desired it to be placed, and which proved it to be a dangerous location, does not show that the plaintiffs were negligent. Under the conditions assumed by a part of the charge in question, that a baffle plate and coal for fuel had been used, it would not have been a dangerous location. The evidence shows that the plaintiffs were careful and solicitous in regard to danger, and frequently spoke of it, and were assured by the employes of the defendant that there was none. The place where the defendant proposed to set the engine was within ten feet or less of a stack of hay, and the plaintiffs asked to have it set ten feet farther from the stack, to lessen the danger from fire. The defendant was charged with the duty of using reasonable diligence to avoid danger. He could not avoid that responsibility by setting the engine in the place pointed out by the plaintiffs, if he knew, or had reasonable ground to believe, that the place was a dangerous one, and that the plaintiffs were ignorant of the fact, without fault on their part, and had selected it in the belief that it would lessen the danger. In that case he should have informed the plaintiffs of the fact, in order to release himself from liability. The case of *Kesee v. Railroad Co.*, 30 Iowa, 82, relied upon by the defendant, is not in point on this branch of the case. The evidence justified the conclusion that the defendant should have known that the place where the engine was set was a dangerous one, and that the plaintiffs were not only ignorant of the fact, but had reason to believe, from the statements made by employes of the defendant in charge of the engine, that it was entirely safe. As applied to the facts of the case, the portion of the charge in question was not erroneous.

V. It is claimed that the plaintiffs are not the owners of the oats in controversy, but that they are

owned by two Bells, known as "Bell Bros.," as tenants of Richardson. The evidence shows clearly that the oats were the property of Richardson and the two Bells, and that they were co-partners, and transacted business under the name of Richardson & Bell Bros. The evidence is ample to sustain the verdict, and we find no ground on which to disturb the judgment of the district court. It is therefore **AFFIRMED**.

W. M. PRATMAN, et al., Appellants, v. THE CENTERVILLE LIGHT, HEAT AND POWER COMPANY.

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101	327
100	245
107	150

Corporations: SIGNATURE TO NOTE: Secretary. Under by laws
 2 which require all contracts and agreements entered into by the corporation to be signed by the president, and also require the secretary to issue and countersign all orders drawn on the treasurer, the signature of the secretary is not essential to the validity of a note made by the corporation, and signed by the president.

ULTRA VIRES ACT: Consideration. An indebtedness incurred by a
 4 private corporation in excess of the authority conferred by its articles of incorporation, is, nevertheless, valid and enforceable to the extent of the consideration received therefor.

Mismanagement: PERMITTING DEFAULT TO BE TAKEN. Where the
 8 minority of the stockholders of a corporation move for the appointment of a receiver, on the ground of mismanagement, in that the board of directors had authorized a defense to be made in an action on the corporation note, but that default was fraudulently made, fraud will not be presumed, where it is not shown that a defense could have been successfully made.

SAME. The failure of corporation directors to do certain things, is not
 7 a ground for the appointment of a receiver at the instance of a minority of the stockholders, where it does not appear that the things omitted could have been done with reasonable effort, with advantage to the company.

REMEDY AT LAW: Equitable relief. That stock was issued to

of the corporation are not being managed for the best interests of the stockholders, and that a different policy should be adopted.

Courts of equity. A court of equity will interfere with the management of a majority of the stockholders of a corporation, at the instance of the minority, only, when such interference is absolutely necessary to the attainment of justice.

Demurrer: ADMISSION BY. While the facts alleged in a pleading which was demurred to, must for the purpose of the demurrer, be taken as true, only such facts as are well pleaded, will be deemed to be admitted.

Appeal from Appanoose District Court.—HON. T. M. FEE, Judge.

FRIDAY, DECEMBER 11, 1896.

ACTION in equity for the appointment of a receiver, and for other relief. A demurrer to the petition was sustained, and, the plaintiffs refusing to plead further, judgment was rendered in favor of the defendants for costs. The plaintiffs appeal.—*Affirmed.*

Porter & Porter for appellants.

Baker & Moore for appellee.

ROBINSON, J.—This action was originally commenced by W. M. Peatman, as plaintiff, against the Centerville Light, Heat and Power Company and D. C. Campbell, as defendants. Subsequently, ten persons, some of whom had been described in the petition as stockholders, filed an application, the body of which was in words as follows: "We, the undersigned, ask to be made party plaintiffs, and unite in the prayer of the plaintiff for a receiver in said cause, and ask that our rights as stockholders be protected by the court." By an amendment to the petition, the persons named in the application were made parties plaintiff. Sev-

following facts: The defendant company is a corporation organized under the laws of Iowa, its principal place of business being at Centerville. The plaintiff and persons named, most of whom afterwards became parties plaintiff, are the owners of about fifteen thousand dollars of the paid-up capital stock of the company, and "D. C., J. A., C. P., Jennie M., L. O., and Agnes Campbell; T. P., Elma, and M. N. Shontz claim to own and hold about eighteen thousand dollars of stock, all of said parties being non-residents of the state of Iowa, and all near relatives." The capital stock of the company is thirty-five thousand dollars, and the amount of the stock paid up is about thirty-four thousand dollars. The plaintiff, Peatman, is the secretary of the company, and has for five years performed all the duties of the office, and managed the company; and his services were reasonably worth four thousand five hundred dollars, all of which is alleged to be due and unpaid. The plaintiff owns six thousand dollars of the paid-up capital stock, and alleges that he is financially interested in the company in the sum of ten thousand five hundred dollars. The articles of incorporation provide that the indebtedness shall not at any time exceed one-half of the capital stock. However, on the first day of July, 1892, the company issued gold bonds on its property to the amount of fifty thousand dollars, and the petition alleges that it was done without right or authority. On the tenth day of August, 1894, a promissory note was issued to D. C. Campbell for the sum of twenty-one thousand three hundred and sixty-five dollars and forty cents. It was signed in the name of the company, "by T. P. Shontz, President," but it is alleged to have been illegal, because made without authority. To secure its payment, the gold bonds were deposited with the payee. In September, 1895, D. C. Campbell recovered judgment against the

company for the amount which appeared to be due on the note, and an execution, issued for the satisfaction of the judgment, was levied on all the property of the company, and it has been advertised for sale. The persons constituting the board of directors of the company are J. A. Campbell, C. P. Campbell, T. P. Shontz, S. W. Livingston, and the plaintiff Peatman. The petition further alleges that there is a conspiracy between the Campbells and Shontz to wreck the property of the company, and to defraud its creditors and stockholders. Shontz is a brother-in-law of the defendant Campbell, and J. A. and C. P. Campbell are his sons. Those three, and Livingston, who was appointed a director by them, are managing the affairs of the company. It is charged that notice of the action on the note described was served on Livingston only; that the directors instructed Shontz to act as attorney, or to employ an attorney to make defense to the note, and to an action brought by the First National Bank of Lima, Ohio; that, in pursuance of the conspiracy, Shontz employed counsel to defend against the bank, but failed to employ counsel to defend against Campbell, and, with fraudulent intent, permitted a default to be entered, well knowing that there was a good defense to the note. In 1893, there was due D. C. Campbell about one thousand three hundred dollars, as interest, "and, for the purpose of obtaining a controlling interest in the company, procured the issuing of about \$5,200 worth of stock, by paying twenty-five cents on the dollar for said stock, for the purpose of controlling said company, and for the purpose of collecting an illegal indebtedness." It is further averred that the other stockholders paid the par value for their stock, and that it is a fraud on them to permit D. C. Campbell to

offer for the purchase of the plant of the company; that the company is insolvent, but that, with proper management, its debts would be paid, and a dividend could be paid on the stock; that the directors refuse to make efforts to borrow money, and have aided the defendant Campbell, to recover his judgment, to cheat and defraud the minority stockholders. There are other less important averments in the petition, but the alleged fraud is finally stated to be as follows: "In truth and fact, the mismanagement consists in doing nothing to protect the minority, for the purpose of letting the same be sold by said Campbell, to absolutely own and control the property. The fraud consisted in purposely not doing anything to protect the valuable property." The plaintiffs ask that a receiver of the property of the company be appointed; that the judgment of the defendant, Campbell, be canceled, and the sale thereunder be restrained; that Campbell be required to deliver to the receiver, for cancellation, the bonds transferred to him as security; that the issue of the five thousand two hundred dollars stock to him be canceled; and for general equitable relief. The argument for the appellants is devoted almost wholly to the question of the power of the court to appoint a receiver to protect the interest of the minority stockholders against the fraud of the majority.

For the purposes of this case, it may be conceded that the power to appoint a receiver in such an action as this exists; and we are then required to determine whether the petition shows facts which would justify such an appointment. The averments of fraud and illegal action contained in the petition are numerous, but many of them are in the nature of conclusions, without a statement of facts upon which to
1 base them, and may therefore be disregarded.

The demurrer only admits facts which are well pleaded. The petition alleges that the note upon

which the judgment in question was rendered was made without authority, but the only defect alleged

2 is that it should have been, but was not, signed by the secretary. The articles of incorporation authorize the company to establish such by-laws, rules, and regulations as shall be deemed necessary for the management of its business. The by-laws adopted require all contracts and agreements entered into by the company to be signed by the president, and also require the secretary to issue and countersign all orders drawn on the treasurer. The note made to the defendant Campbell was not an order drawn on the treasurer, but was a promissory note, and was sufficient with the signature of the president. Livingston, upon whom the notice of the action on the note was served, was a director of

3 the company, and in actual control of its business. The board of directors authorized a defense to be made to the action, and the fact that none was made does not show that the default was fraudulent. It is not shown that a defense could have been successfully made, and, if it could not, it should not have been attempted. The petition fails to show that the judgment was illegal, or to set out any facts which would justify any interference with it.

If we understand the averments of the petition, it is claimed that the fifty thousand dollars in gold bonds are illegal, because issued in excess of the amount of indebtedness which was authorized

4 by the articles of incorporation. It is not shown that the bonds were issued without consideration, and it is well settled that the indebtedness of a private corporation in excess of the limit fixed by the articles of incorporation is valid to the extent of the consideration received for it. *Heuer v. Carmichael*, 82 Iowa, 290 (47 N. W. Rep. 1034), and cases therein cited. Moreover, it is stated by the appellants in

argument, that the property of the company has been sold for the full amount of the Campbell judgment, with interest and costs. Campbell's interest in the bonds is therefore at an end, and it is not shown that he or any other person is likely to put them into circulation. Nor is sufficient ground shown for canceling the stock issued to the defendant Campbell.

5 The averments in regard to it are ambiguous, but, assuming that it was issued at his instance, it is shown that he has paid for it twenty-five per cent. of its par value, at least; and, if anything remains unpaid, the company and its creditors have an ample remedy to recover the amount due. The real complaint which the plaintiffs make is that the affairs of the company are not managed for the best interests of its stockholders, and that a different policy

6 should be adopted. But a minority of the stockholders cannot dictate the policy of a corporation, and no interference with its management in their behalf can be justified "unless such interference be absolutely necessary to the attainment of justice." 1 Morawetz Priv. Corp., section 281; 2 Cook, Stock and Stockholders and Corp. Law, section 746; Id. p. 1414, section 863.

The affairs of the defendant company are being managed by a board of five directors, four of whom seem to act harmoniously together. The fact that three of them are related to the defendant Campbell, while worthy of attention in connection with the charge of conspiracy and fraud, does not afford the plaintiffs any ground for relief. The charges of conspiracy and mismanagement are, on the whole, indefinite, and fail to show that the officers of the company are not discharging their duties with reasonable

7 diligence. They are shown not to have done certain things, but it does not appear that the things omitted could have been done by reasonable

effort, with advantage to the company. We conclude that the facts well pleaded in the petition do not show any ground upon which the plaintiffs are entitled to relief in this action. The judgment of the district court is therefore **AFFIRMED**

C. H. GATCH v. W. C. GARRETSON, *et al.*, Appellants.

Construction of Lease: EVIDENCE: Contracts. Under a lease of a building which fixes a certain rent and provides that the rent shall
 3 be a lesser sum until the landlord shall cause the premises to be heated by steam, there is no obligation to furnish the steam, except as a condition precedent to recovering the higher rental. Nothing is required, at all events, except sufficient heat to make the premises comfortable, and the burden of showing that this was not furnished, is on lessee.

AGREEMENT TO FURNISH HEAT: Evidence. Defendants leased a portion of a building for use as a lodging house, the building to be heated by steam, by the lessor. Experts testified that the radiation provided by the lessor was sufficient to keep the rooms com-
 8 fortable for sleeping purposes, and it appeared that other tenants in the same building received sufficient heat. *Held*, that the evidence justified the finding that the lessor had substantially complied with the obligation to heat the leased premises.

Law and Equity: CONSOLIDATION: Waiver by Pleading. An action at law and a suit in equity for the collection of rent were consolidated as a cause in equity, with a proviso that the consolidation
 1 should not prejudice the defendants' right to a jury trial upon the matters set out in his answer to the law action. A substituted petition asking equitable relief in the law action was filed, and after the consolidation, defendants filed an amended and substituted counter-claim, triable in equity. *Held*, that it was not error
 2 to refuse to permit the trial of the issues by the jury. Where an issue ordinarily triable at law, is presented by answer to an action properly commenced in equity, plaintiff is entitled to have it tried, as in equity.

Appeal from Polk District Court.—HON. W. A. SPURRIER, Judge.

FRIDAY, DECEMBER 11, 1896.

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THIS is a consolidation of two actions, the purpose of which was the collection of rent due. The first action was commenced at law, and was aided by a landlord's attachment. The second was brought in equity, to foreclose a lien given by the lease upon all property of the defendants used or kept in the leased premises, whether it was exempt from execution or not. On the application of the plaintiff, the action at law was transferred to the equity docket, and the two were consolidated, and heard as in equity, on their merits. A decree was rendered in favor of the plaintiff, for two hundred and forty dollars, with interest, attorney's fees, and costs, and ordering the proceeds of the attached property to be paid to him. The defendants appeal.—*Affirmed.*

Merritt & Bunting and *Jas. A. Merritt* for appellants.

Gatch, Connor & Weaver for appellee.

ROBINSON, J.—On the fifteenth day of July, A. D. 1892, the plaintiff leased to the defendants the entire second floor of a certain building in the city of Des Moines, for the term of fourteen months and fifteen days. The lease, which was in writing, required the defendants to pay a rent of fifty-six dollars each month, but contained a proviso that, until the plaintiff should cause the premises to be heated with steam, the monthly rent should be forty-five dollars. The premises were to be used "for a lodging house," and for no other purpose, excepting that the defendants were permitted to do the family cooking necessary for themselves. They took possession of the premises

parties had some conversation in regard to another lease, and one was drawn, but never signed. In the month of October, 1892, steam heat was furnished for the leased premises, and, thereafter, the defendants paid fifty-six dollars each month as rent, until August, 1893. Nothing was paid after July of that year, excepting forty dollars. Therefore, if the defendants are responsible for rent at the rate of fifty-six dollars per month from the first day of August, 1893, to January, 1894, they were owing to the plaintiff the amount fixed by the decree of the district court. The defendants claim that the plaintiff agreed to furnish good and sufficient steam heating for the leased premises, but failed to do so, and that, for that reason, they were not required to pay more than forty-five dollars per month as rent. As further defense, the defendants claim that, by reason of the alleged failure of the plaintiff to furnish the heat for the premises, as agreed, eight of the seventeen rooms included therein could not be used, and were of no value to them during cold weather, and that the other rooms were not adequately warmed; that, in consequence of the failure of the plaintiff to furnish the necessary heat, the defendants were unable to let the rooms during cold weather; that, relying upon the agreement of the plaintiff, they furnished the rooms at a great expense, and continued to occupy the premises from month to month, believing that the plaintiff would, within a short time, fulfill his agreement; that the money they have paid as rent is more than the reasonable value of the premises during the time they were occupied by the defendants; and that, by reason of the facts stated, the rent has been fully paid.

1 After the two actions were consolidated, the

that he agreed to furnish the necessary steam heat for warming the premises, but failed to do so; that the defendants were unable to warm them by using stoves, for the reason that they were in a two-story building, the chimneys of which were without proper draughts, because they were not in good order, and because of the proximity of a seven-story building; that the value of the premises was much less than it would have been had the plaintiff fulfilled his agreement; that, while the defendants were occupying them, he promised repeatedly that he would fulfill his agreement, and that, relying upon these promises, the defendants continued to occupy the premises, and to pay rent therefor; that, by reason of the failure of the plaintiff to furnish the required amount of steam, the reasonable value of the premises during the time they were occupied by the defendants was but two hundred and twenty-five dollars; that, by reason of the alleged failure of the plaintiff, and the consequent inability of the defendants to let the rooms, they were damaged in the sum of four thousand and forty dollars. The counter-claim further alleges that the attachment was wrongful, and that the plaintiff wrongfully converted to his own use attached property of the value of five hundred and sixty-nine dollars, by reason of which the defendants have sustained damages to that amount; that the defendant, W. C. Garretson, sustained damage in the further sum of one hundred dollars by reason of an alleged wrongful levy of the attachment on his property which was exempt from execution. In another division of the counter-claim, the defendants claim to have sustained damages to a large amount by reason of the seizure of personal property under a special attachment which was issued in the action in equity.

I. The order of the district court which sustained the application of the plaintiff to consolidate the two

actions provided that the consolidation should not "in any way prejudice whatever right defendants
2 may have to a jury trial of the matter set out in their answer." When the order was made, the pleadings which had been filed were the original petition of the plaintiff, and the answer thereto (which included counter-claims for the alleged failure of the plaintiff to perform his agreement for heating the building, and for the alleged wrongful conversion of property taken under the landlord's attachment), an amended and substituted petition to which an answer had not been filed, and the petition in the action in equity. The answer to which the order of consolidation referred, was the one filed to the original petition. After the order was made, the defendants filed an answer to the substituted petition, and on the same day the "amended and substituted counter-claim," which was, in terms, made to apply in both cases. To the final answer, the plaintiff filed a reply. When the consolidated actions were reached for trial, the defendants demanded a trial by jury, of the issues made on their counter-claims. The demand was refused, the district court holding that the defendants had a right to a jury trial on their counter-claim as it stood when the cases were consolidated, but that the issues as presented by the amended and substituted counter-claim were triable in the action in equity, and not in the action at law. The defendants excepted to the ruling, but, after consultation with counsel, elected "not to dismiss any item of the counter-claim." They now complain of the rulings of the court in refusing to allow them a jury trial. The action in equity was commenced to foreclose the lien given by the lease upon certain personal property used in the leased premises, but claimed by the defendant, W. C. Garretson, to be exempt from execution. The substituted petition in the action at law asked the foreclosure of

the lien given by the lease upon all property of the defendants used and kept in the leased premises during the term of the lease, whether exempt from sale on execution or not. It will be noticed that, after the filing of the substituted petition, equitable relief was being asked in each action. The right of the plaintiff to thus change the action commenced at law, and to have the two actions consolidated, does not appear to have been questioned. It is the right of either party to an action properly commenced by ordinary proceedings, to have issues exclusively cognizable in equity tried in equity, by the court, without a jury. Code, section 2517; *Morris v. Merritt*, 52 Iowa, 501 (3 N. W. Rep. 504). As a rule, issues of fact in an action in an ordinary proceeding must be tried by a jury, unless a jury is waived. Code, section 2740. But, when an issue which would ordinarily be tried as at law is presented by answer in an action properly commenced in equity, the plaintiff is entitled to have it tried as in equity. *Ryman v. Lynch*, 76 Iowa, 588 (41 N. W. Rep. 320); *Wilkinson v. Pritchard*, 93 Iowa, 308 (61 N. W. Rep. 965). See, also, *Marquis v. Illsley*, 99 Iowa, 135 (68 N. W. Rep. 589). Therefore, it was the right of the plaintiff to insist that the issues presented by the substituted counter-claim in the action, commenced in equity should be tried in equity. The substituted counter-claim was intended to be considered as in each case, and, therefore, the issues which it tendered, were the same in both cases. But the defendant was not entitled to have two trials of the same issues,—one at law, and the other in equity. Although the first action was commenced by ordinary proceedings, yet, by the filing of the substituted petition, its character was changed to that of an action in equity; and, it was, for all practical purposes, the same as though it had been commenced in equity. As both actions

were pending in equity, and, by reason of the consolidation, were, virtually, but one case, the district court rightfully refused to permit a trial of any of the issues by jury.

II. It is claimed by the appellants that the lease given by the plaintiff required him to furnish steam heat when it should be needed, and sufficient in amount to keep all of the rooms in the leased premises comfortable for use at all times. We have examined the lease with much care, but we do not find that it, in terms, required him to furnish steam heat. The only provision in regard to heating is contained in a portion of the lease, of which the following is a copy: "Provided, that, until said Gatch shall cause said premises to be heated by steam heat by the Des Moines Steam Heating Company, the monthly rent shall be \$45." There is a further provision to the effect that the plaintiff should not be under any obligation to make repairs during the term of the lease. We are of the opinion, however, that, to entitle the plaintiff to the full rent of fifty-six dollars per month, he was required to furnish sufficient steam heat to make the premises comfortable for the purpose for which they were leased; that is, for a lodging house. He placed in them steam radiators, which he caused to be supplied with steam by the Columbus Buggy Company, for the reason that he was unable to secure a connection with the works of the Des Moines Steam Heating Company. The source of supply was not, however, a matter of consequence to the defendant so long as the supply was sufficient. Whether it was sufficient is the question of chief importance in the case. The burden of showing that it was not, is on

and it shows that there were times when the rooms were not warm enough for persons to sit in them at all times of every day, with comfort. Four of the rooms were occupied by the defendants. Twelve were to let all of the time, and another, a part of the time. All of the rooms which were intended for letting, opened upon a hall which was supplied from two steam radiators. Six of those rooms were supplied with radiators. Two rooms which did not have radiators opened into rooms which were supplied with them, and four rooms were warmed, only, from radiation in the hall. It is shown by expert testimony, that the radiation furnished was of sufficient capacity to make all of the rooms comfortable for sleeping purposes, and that it was more than is usually furnished for the same space in ordinary hotels. The plaintiff employed a janitor, who was instructed to so manage the regulator as to keep the temperature at from seventy to seventy-five degrees, and made arrangements by which the defendants and other tenants who occupied portions of the same and another building could procure additional heat, and make proper complaint if it was not furnished. The defendants complained a few times that the heat was insufficient, but always paid, without objection, the full rent of fifty-six dollars after the steam heat was furnished, until the next August. At one time, when complaint was made that some of the rooms were not sufficiently warmed, the plaintiff offered to furnish additional radiation for an increase of four dollars a month in the rent. but his offer was not accepted

all of the evidence with regard to the amount of heat needed and the amount furnished. We are satisfied, however, that the rooms were sufficiently warmed for the purpose for which the plaintiff leased them, and he complied, substantially, with all the obligations imposed upon him by the lease.

III. We have disposed of the controlling questions in this case. Some are suggested by the record, but are not presented in argument. Others, in view of the conclusions announced, are immaterial. The appellants complain that there were irregularities in the issuing of the attachment, but, as the claim is made for the first time in reply, it will not be further noticed. The decree of the district court appears to be correct, and is **AFFIRMED**.

STATE OF IOWA V. W. J. WARNER, Appellant.

Manslaughter: JURY QUESTION. It appeared that defendant took up some posts set by deceased for a division fence, on what deceased believed was the line between their farms, but which defendant claimed was not such line; that soon afterward, as defendant was driving his seeder over the line, and on that land claimed by deceased, the latter stopped it; that defendant went where deceased was; that, during a fight which ensued, defendant stabbed deceased with a pocketknife, killing him; that the trouble about the division line had existed about a year; that defendant had been acquitted of trespass, for which deceased had him arrested; that defendant was a much smaller and younger man than deceased; and that, as defendant knew, a few days before the fight, deceased
1 put his shotgun in his wagon, and drove to the disputed line. There was evidence that, before such dispute arose, deceased carried a revolver, that he was quarrelsome, and in the habit of making threats of violence to others. Defendant knew his character. He testified that, after he was acquitted of trespass, he was told

in the leg, somewhere; that, while he was getting out his knife, deceased was following him up; that he had his knife in his right hand, and was warding off the blows with his left; and that, if he had run, he might have got away. Deceased had no weapon. Held, that the evidence supported a verdict for manslaughter.

RULE AS TO SELF DEFENSE. The killing of an assailant is excusable on the ground of self defense, only, when it is, or reasonably appears to be, the only means of saving one's own life or preventing great bodily injury, and, if the danger can be avoided by retreat, or otherwise, the killing is not excusable.

Appeal from O'Brien District Court.—HON. SCOTT M. LADD, Judge.

FRIDAY, DECEMBER 11, 1896.

THE defendant was indicted for the crime of murder in the second degree. He was tried and convicted of manslaughter. From a judgment or sentence of imprisonment in the penitentiary, he appeals.—*Affirmed.*

C. A. Babcock and W. D. Boies for appellant.

Milton Remley, attorney general, for the state.

ROTHROCK, C. J.—It is conceded that on the second day of April, 1894, the defendant killed C. W. Inman, by stabbing him with a pocketknife in the lower part of the left side of his body. The defendant pleaded not guilty, and his defense was that his act was excusable upon the ground of self defense. In other words, he claimed that he was not guilty, under the familiar doctrine of the law that a person is excusable for taking the life of a person who attacks him, when the facts and circumstances attending the encounter are such as to lead an ordinarily cautious and prudent man to believe that the act he did was necessary to save his own life, or to protect his person from great bodily injury. The

defendant and deceased were owners of adjoining farms. There was a dispute between them as to the true location of the line between the two tracts of land. This contention had been existing for about a year. There was no partition fence between them until a few days before the tragedy, when the deceased set some posts, and stretched a barbed-wire on them, for some distance. The defendant took up and removed one or more of the posts, and, on the evening of the fatal encounter, he was engaged with a seeder and team in sowing oats on land along his boundary line. He crossed over the place where deceased claimed the line was, and, while driving and riding on his seeder, the deceased came from his house, and went in front of the team, and took hold of the bridle bits, and stopped the horses. The defendant left his seat on the seeder, and went to where the deceased was, and the parties engaged in a fight. The defendant claims that the deceased struck at him two or three times, and that he warded off the blows with one arm, and with his other hand he took his pocket-knife, and made the fatal stab. He testified that he did not intend to kill Inman. The conflict was of very short duration, and, while it was transpiring, the team ran away. When Inman was stabbed, he took a few steps, and laid down, and died within a few minutes afterwards. As we understand the evidence, it was ascertained by a survey of the land made after the tragedy, that the true line was where the defendant claimed that it was. But, so far as appears, the deceased believed that he was right about the boundary of his land. Inman was fifty-seven years of age, and of large size. The defendant was a much smaller and younger man.

effect that he was a man of violent temper and overbearing disposition, and in the habit of making threats of violence to others. A few days before he was killed, and when the dispute was pending, he put his shotgun in his wagon, and drove to the disputed line, where the defendant had taken up a post set by the deceased; and there is evidence that he at one time, before this contention about the boundary line, carried a revolver. In short, he was contentious, quarrelsome, abusive, and profane. The defendant knew that Inman had a gun in his wagon when he drove over to the disputed line, and, in his controversies with him, he had learned by observation and by information from others what the true character of Inman was. After the death of Inman, the defendant went to his own home. He made no attempt to escape, but surrendered himself, and submitted to an arrest without a warrant. He laid his pocket knife on the shelf, and said, "I never will carry a knife again." There were no witnesses near to the parties at the time of the collision between them, in front of the horses. Two or three saw the affray at a distance, but they could not describe it more particularly than to say it was a "scrap" or a fight. Both of the men were in a standing position until Inman went down, after he was stabbed. The defendant was a witness in his own behalf. He gave a history of the contention and trouble between him and Inman. Much of this had reference to stock passing over the unfenced line. It appears that Inman had moved on his farm the year before, and the defendant had raised crops, and cut hay, and stacked it on the land, having farmed it as a tenant. Inman had the defendant arrested for trespassing on the land by removing the hay, and refused to allow defendant's stock to pasture in the corn stalks. The defendant was tried before a justice of the peace, and was acquitted. The defendant

testified that after that trial was over, and on the same day, he was told that Inman threatened that, if he could not keep defendant off his land by law, he could keep him off with a shot gun, and he was then warned that Inman would kill him. The defendant, in his testimony, related the facts immediately attending the killing of Inman as follows: "I was driving down from the north end when I saw Inman coming up the road towards me, but I had no idea he intended any trouble. The first I knew about any trouble was that he stepped up, and grabbed my horses by the bits, and he said, 'Damn you, are you going to sow there?' And I told him to get away, and let my horses alone. He did not let go, and I got down off the seeder, and went around to where he was, to the head of the horses. He let go of the horses, and struck at me two or three times, and I pulled out my knife, and stuck it into him. The reason I stuck it into him was because the threats that he had made against me came into my mind, and I did not know but what he had something in his pocket, a weapon of some kind, and I supposed I would be killed, or I would be hurt seriously, if I did not defend myself; and, in sticking him with the knife, I did not intend to kill him, but I did it to protect myself, or to keep him from killing me, or from doing me great bodily harm. I aimed to strike him in the leg somewhere, and struck low on purpose. My intention was to keep him from making assaults on me. * * *" Further on in his testimony, he said "that, while I was getting out the knife, he was following me up, and was pretty close to me. I had the knife in my right hand, and was warding off his blows with my left. I do not think I struck at him before I drew out my knife, for he was firing his blows at me, and I was warding them off. * * * If I had run, I might have got away from him."

We have stated the leading facts, for the reason that the only doubt we have in the case is whether the evidence warranted the jury in finding the defendant guilty of manslaughter. After a careful examination of the whole of the evidence, our conclusion is that it was a fair question for the jury to determine, and that the district court did not err in overruling the motion for a new trial, on this ground. The fact is that Inman had no knife, revolver, or other weapon upon his person at the time.

II. We have stated the rule applicable to the law of self defense. In the late case of *State v. Jones*, 89 Iowa, 183 (56 N. W. Rep. 427), it is said "that the killing of an assailant is excusable on the
2 ground of self defense only, when it is, or reasonably appears to be the only means of saving one's own life, or preventing some great bodily injury. If the danger which appears to be imminent can be avoided in any other way, as by retiring from the conflict, the taking of the life of the assailant is not excusable." The instructions of the court upon this branch of the case are assailed as erroneous. We will not set them out. They are in accord with the rule above announced, and with many other cases determined by this court.

III. It is said that the indictment is fatally defective. This position is not well taken. It is not materially different from indictments which have been held good for murder in the second degree, by this court. This is so manifest that we will not set out the indictment.

IV. Other objections are urged, which demand no special consideration. The whole record shows that the defendant was fairly tried. The rulings of the court all through the trial were liberal towards the defense. And the jury were evidently in sympathy with the defendant. Each one of the twelve jurymen

signed a request that, in fixing the sentence, the court should be merciful to the defendant. The judgment was that the imprisonment in the penitentiary should be for two years and three months. We discover no ground for interfering with the judgment, and it is **AFFIRMED.**

THE CITIZENS' NATIONAL BANK, Appellant, v. C. C. LOOMIS.

Assignment of Judgment: WHAT PASSES BY. Where a landlord's attachment is issued, and the property of the tenant is seized, and judgment is rendered for the landlord, on assignment of the judgment, all right of the judgment creditor to recover damages against the sheriff for negligence in the care of the property seized, passes to the assignee.

Care of Attached Property: DIRECTION OF PLAINTIFF. Where a sheriff, levying an attachment, delivered the property to a receptor, by direction of the plaintiff in the attachment, he is not liable for the negligence of the receptor.

DIRECTION OF ATTORNEY: "Agreement by attorney" defined. An order by an attorney to a sheriff to turn over property attached, to a third person for safe keeping, is not an agreement, within Code, section 213, providing that no evidence of an agreement of an attorney shall be received except the statement of the attorney, or his written agreement, or an entry thereof on the records of the court.

Return of Officer: CONCLUSIVENESS: Parol evidence. Where a sheriff, to his return on a writ issued in a landlord's attachment, annexed a receipt of a third person for the property attached, and, also recited that he held the property subject to the order of the court, he can show by parol that the property was delivered to such third person by the direction of the attorney for the plaintiff in the attachment. The return was not required to show that the property had been delivered to a third person on the direction of plaintiff, and as to matters not authorized to be returned, the return is not conclusive.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

FRIDAY, DECEMBER 11, 1896.

IN March, 1889, one Smith commenced an action against Hess, in the district court of Polk county, Iowa, for the recovery of rent, and asking the issue of a landlord's attachment. The writ was issuance and placed in the hands of the defendant, then sheriff for service. On April 12, 1889, the writ, with the following return thereon, was filed with the clerk of said court: "State of Iowa, Polk County—ss: I hereby certify that the annexed writ of attachment came into my hands the first day of March, 1889, at — o'clock, — m. of said day, and by virtue thereof I levied on the following described personal property: All of the furniture, fixtures, carpets, beds, bedding, kitchen and dining room furniture, dishes, etc., in the Windsor Hotel (formerly the Given House), in Des Moines, Polk County, Iowa, as the property of said defendant; said levy being made on the first day of March, 1889, at —

1 o'clock, — m. of said day. And I now hold said property subject to the order of the court, and now, the seventh day of March, 1889, return this writ, with my doings in the premises. C. C. Loomis, Sheriff of Polk County, by L. A. Shaw, Deputy." On the back of the writ, the following appears: "Received of C. C. Loomis, sheriff, for safe keeping, all the furniture, fixtures, carpets, beds, bedding, kitchen and dining room furniture, dishes, etc., being all the furniture, etc., in the Windsor (formerly the Given) House, and I agree to deliver the same to said sheriff on his demand or order. March 1, 1889. J. M. Griffith." Such proceedings were had in that case as that a judgment was entered in plaintiff's favor for six hundred and eighty-six dollars and ninety-eight cents and costs, including forty-two dollars and ninety-three cents attorney's fees; and an order was entered that a special execution issue for the sale of the attached property. Thereafter, upon an appeal taken by the defendant to this court,

the judgment below was affirmed; 83 Iowa, 238 (48 N. W. Rep. 1030), and on July 10, 1891, and a special execution issued for the sale of the attached property. This execution was returned by the sheriff, unsatisfied, no property being found. Thereafter, the judgment was assigned to plaintiff, and in March, 1892, it instituted this action against the defendant for the recovery of the amount of said judgment, and costs. The cause was tried to the court and a jury, and a verdict returned for the defendant, upon which judgment was entered. It appeared on the trial, that the property levied upon was sufficient to have satisfied the judgment, interest, and costs; and that at the time the judgment was affirmed by the supreme court against Hess, he was, and ever since has been, insolvent. Plaintiff appeals.—*Affirmed.*

Gatch, Connor & Weaver and *J. A. McCall* for appellant.

Read & Read and *D. F. Callender* for appellee.

KINNE, J.—I. Appellee insists that, even if there was error in the ruling of the court in the respects hereafter spoken of, the same was without prejudice, for the reason that plaintiff has no right to prosecute this suit. The claim is that the assignment of the judgment alone did not carry with it to plaintiff the right to sue the sheriff for damages arising by reason of his alleged negligence in permitting the property levied upon to be disposed of. Just what rights will pass by the assignment of a judgment to an assignee, other than the right to sue the sheriff for damages arising by reason of his alleged negligence in permitting the property levied upon to be disposed of, is not clear.

negligence, it is because such right passed by the assignment of the judgment, as an incident to it. If appellee's claim is sound, then no right of action, as against the sheriff, for damages, passed to the plaintiff bank, by the assignment. Now, the right, if any, to recover damages, existed and was vested in Smith, the possessor of the judgment, prior to the time the assignment was made. If it did not pass by the assignment of the judgment, it must still remain in Smith. It can hardly be successfully contended that Smith might part with all his interest in the judgment, and still reserve to himself the right to sue the sheriff for damages arising out of failure to do his duty in relation to the disposition of the property which had been taken on a writ issued by virtue of the very claim upon which the judgment itself was based. Nor can it be said that the assignment of the judgment had the effect of absolving the sheriff from liability for negligence in caring for the attached property. Hence we think, if a cause of action existed against the sheriff for damages for such negligence, prior to the assignment of the judgment, it must be held to still exist in favor of some one, inasmuch as there is no claim that it has been satisfied, or been barred by the statute of limitations. As we have indicated, Smith, having parted with his interest in the judgment, could not maintain an action against the sheriff, because it was the interest in the judgment, alone, which entitled him to claim damages for the negligent loss of the property upon which he relied for the satisfaction of the same. Now, the original case was by the defendant appealed to this court, where the judgment was affirmed. A special execution properly issued for the sale of the attached property. That the right to this execution passed by the assignment of the judgment cannot be doubted. So, also, the assignee would have the right to have the property

sold, and the proceeds applied in payment of the judgment. Now, if the sheriff has, by negligence, permitted the property to be lost, destroyed, or disposed of, so that it cannot be reached by this special execution, he has thereby deprived the present holder of the judgment of a substantial right, for which, in a proper case, he should be held liable to make restitution. It is the general rule that the "assignment of a judgment necessarily carries with it the cause of action on which it is based, together with all the beneficial interest of the assignor in the judgment and all its incidents." 2 Freeman, Judgm. section 481; *Ullman v. Kline*, 87 Ill. 268; *Ryall v. Rowles*, 2 White & T. Lead. Cas. Eq. p. 1667; *Schlieman v. Bowlin*, 36 Minn. 198 (30 N. W. Rep. 879). In the Minnesota case above cited, which was an action upon a replevin bond by the assignee of the judgment, the court said: "It is a familiar rule in equity, of universal application, that the assignment of a demand entitled the assignee to every assignable remedy, lien, or security available by the assignor as a means of indemnity or payment, unless expressly excepted or reserved in the transfer of the demand. The assignment of the demand, which is the principal thing, operates as an assignment of all securities for its recovery or collection, and upon such securities the assignee, as the real party in interest, may maintain an action in his own name." 2 Jones, Mortg. sections 829, 1316, 1377. In the Illinois case it was held that an appeal bond was but an incident of the debt, and a right to sue thereon was vested in the assignee of the judgment. As supporting the general rule above stated, see 1 Am. & Eng. Enc. Law, p. 884; 2 Black, Judgm. sections 948, 952. So, it has been held that the assignee of a judgment takes the same right

do not go to the extent of those above cited. Thus, in Michigan it has been held that where an attachment was issued and levied upon property, and a statutory bond given to the sheriff by the defendant, who retained possession of the property, and the judgment was afterwards assigned by an instrument that did not mention the bond, such assignment did not authorize the assignee to sue upon the bond in his own name. *Forrest v. O'Donnell*, 42 Mich. 556 (4 N. W. Rep. 259). And see *Timberlake v. Powell*, 99 N. C. 233 (5 S. E. Rep. 410). We think that the assignment of the judgment in the case at bar carried with it the right to the assignee to avail himself of any remedy or means of indemnity, security, or payment possessed by, or which could have been made available to, the assignor, as against the sheriff.

II. On the trial, the defendant introduced evidence tending to show that, at the time the property was levied upon, the attorney for the plaintiff in that action, directed the deputy sheriff, who made the levy, to place the goods in the custody of one Griffith, as receptor, and that it was done. The receipt of Griffith for the goods appears on the writ, but not in the return. This evidence, and more of a similar character,

was objected to, on the ground that it
3 tended to contradict the return of the officer.

The court held, that the return could not be contradicted by parol, but said: "The fact that, by direction of plaintiff, it [the property] was turned over to the receptor, if it was, does not contradict the levy." It may be conceded to be the general rule,

Drake, Attachm. sections 204, 206; 1 Shinn, Attachm. sections 226, 227; 22 Am. & Eng. Enc. Law, pages, 683, 684. By an examination of the foregoing authorities, and the cases therein referred to, it will be seen that there are many exceptions to this rule. Our statute provides: "The sheriff shall return upon every attachment what he has done under it. The return must show the property attached, the time it was attached, and the disposition made of it. * * *" Code, section 3010. It is also well settled, that return upon a writ of attachment is evidence only, of what can properly be embraced in the return. In *Aultman v. McGrady*, 58 Iowa, 118 (12 N. W. Rep. 233), it is said: "There is no provision for a return showing the acts of any one but the officer. A statement in the return purporting to show the acts of some one other than the officer, is without authority of law, and surplusage." The provisions as to returns on executions are substantially the same as those relating to a return on a writ of attachment. Therefore, a return embracing matters not required by statute, or which relate to acts done outside of the officer's duty, would not be receivable as evidence of such facts, nor would it in any way conclude the parties. 1 Shinn, Attachm. section 227; Freeman, Ex'ns, sections 364, 366; *Plow Co. v. Jones*, 71 Iowa, 238 (32 N. W. Rep. 280); Murfree, Sher. section 867. Under the authority of *Aultman v. McGrady*, *supra*, the sheriff was not required to set out in his return the fact, if such it was, that he had delivered the attached property to Griffith, the receiptor, in pursuance of the directions of the plaintiff. That would have been the recital of the acts of persons other than the officer, which the statute does not require to appear in the return. Now, it might be proper to show in the return the fact that the officer had turned the goods over to a party named as a receiptor, but to set out

that such action was taken at the request or direction of some one is not within the requirements of the statute. While the fact of the placing of the property in the hands of Griffith as a receptor did not appear in the return, it did appear from Griffith's receipt on the back of the writ. Surely, no prejudice could arise because the naked fact that the property had been placed in the hands of some one as receptor did not appear in the return. So far as the plaintiff was concerned, that fact, if stated in the return, would not have advised it that the property was placed in the receptor's hands by the direction of its assignor.

Counsel for appellant says: "We grant that it was not necessary to state in the return the simple and unqualified fact that the officer had left the property with the receptor, but insist that, to save
4 himself from being liable on his return for its negligent loss, it was necessary to state the fact, if a fact, that he did so by direction of the judgment creditor." The contention appears to us, in view of the requirements of the statute, to be unsound. The return stated all that the law required. To have set forth the fact that, by direction of the judgment creditor, the property had been placed in Griffith's hands, would have been the recital of the fact or direction of one other than the officer, and, as we have seen, was not proper. The evidence introduced over plaintiff's objection was as to a fact not required to be stated in the return, and therefore properly no part of it, and hence it did not tend to contradict the return.

It is said that, because the sheriff's return shows that he holds the property subject to the order of the court, therefore evidence that it is held by a receptor, under the direction of the judgment creditor, is
5 a contradiction of the return. We do not think this is so. In a sense, at least, the property, having been levied upon by the officer, is in his

possession, even though in the hands of a receiptor nominated by a judgment creditor. "When the property attached is by the officer delivered into the hands of a keeper or receiptor, such person is the agent of the officer making the attachment, and for his torts or negligence in respect to the property the officer is liable. When, however, the property is delivered to a bailor named by the plaintiff, the officer is relieved thereafter from responsibility to the plaintiff for the safe keeping of it." 1 Shinn, Attachm., section 392. Ordinarily, and in the absence of evidence to the contrary, it would be presumed that the possession of the receiptor was the possession of the sheriff. Nor does it cease to be such because, by reason of his own acts, the judgment creditor is not in a position so that he may hold the officer personally liable for damages which arise by reason of the receiptor's negligence. The property attached, though left with a receiptor by direction of the judgment creditor, is still in the custody of the sheriff. If it were not so, the levy would, in law, be abandoned. Drake, Attachm. (7th Ed.), section 350. We are of the opinion that the evidence objected to was properly admitted, and that it did not contradict the return of the officer.

III. There can be no doubt that the officer levying the attachment had the right to deliver the property to Griffith, the receiptor, by direction of the judgment creditor, the plaintiff in that action; and, if he did so by the direction of said plaintiff, or his attorney, he would be relieved from personal liability. *Davis v. Maloney*, 79 Me. 110 (8 Atl. Rep. 350); *Shepherd v. Hall*, 77 Me. 569 (1 Atl. Rep. 696); Drake, Attach. (7th Ed.) section 361; *Jenney v. Delesdernier*, 20 Me. 183; *Willard v. Goodrich*, 31 Vt. 597; *Strong v. Bradley*, 14 Vt. 55; *Donham v. Wild*, 19 Pick. 520; 1 Shinn, Attachm. section 392. It

is said in Freeman on Executions (2d Ed., section 108): "One inquiry will be answered here. Who is entitled to control the writ? The officer should always bear in mind that the writ is intended for the benefit of the plaintiff, who alone is interested in its enforcement. The interests and wishes of the plaintiff should at all times be respected. * * * But all directions of the plaintiff not savoring fraud nor undue rigor and oppression must be obeyed, or the officer will be held liable for injuries flowing from his disobedience."

IV. It is said that the testimony admitted showed an agreement, and that parol evidence should not have been admitted to establish it. Our Code (section 213) provides that an attorney and counselor
7 has power "to bind his client to any agreement, in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court." It is claimed in this case that the direction to turn the property over to Griffith, the receptor, was given by the attorney for the judgment creditor. He denies so doing; hence it is said the evidence of the deputy sheriffs was not admissible. If this direction of the attorney to place the property in Griffith's hands as a receptor was given, and if it can be said to constitute an agreement, within the meaning of the statute, then the testimony should not have been admitted. That it was not an agreement in a statutory sense seems too clear to admit of a doubt. It was simply an order or direction given to the sheriff, which it is claimed, he complied with.

We have considered every question raised which is deemed of importance, and reach the conclusion that there was no error in the respects complained of.—**AFFIRMED.**

M. A. CREGLOW, Appellant, v. CREGLOW BROTHERS, et al.

General Assignment: PREFERENCES: Validity. Evidence that a father sold to his sons their partnership stock in trade, taking their notes for the price; that they had no other property subject to execution, and the father knew it; that, after conducting business at a loss, the sons, knowing themselves bankrupt, through false statements to a commercial agency, obtained goods on credit, for the purpose of stocking up and then failing; that the sons then
 1 executed a chattel mortgage on their entire stock to their father
 • for their entire debt to him, and, about an hour afterward, on the advice of the father's attorney, made an assignment for the benefit of creditors to their brother-in-law, warrants a finding that the mortgage and assignment constitute one transaction, in effect, a general assignment for the benefit of creditors, with a preference, which, under Code, section 2115, is void.

MORTGAGE CREATING PREFERENCE. Under Code, section 2115, declaring a general assignment by an insolvent for the benefit of creditors invalid, if not made for creditors equally, a mortgage
 • constituting a part of and rendering a general assignment invalid because it creates a preference, is itself void as against creditors of the insolvent.

Appeal from Franklin District Court.—HON. D. R. HINDMAN, Judge.

FRIDAY, DECEMBER 11, 1896.

SUIT in equity to foreclose a chattel mortgage

J. M. Hemingway, D. D. Murphy, D. J. Murphy, and J. H. Trewin for appellant.

Taylor & Evans, E. P. Andrews, and Blythe, Markley & Smith for appellees.

ROTHROCK, C. J.—On the seventeenth day of November, 1894, the defendants, Creglow Bros., were engaged in keeping a general store at Hampton, in Franklin county. On that day they executed and delivered to the plaintiff a chattel mortgage upon all of their stock in trade to secure the payment of a promissory note of that date for fourteen thousand three hundred and thirty-two dollars. The note was made payable in one month after its date. On the same day, and within a short time after the execution of the mortgage, said defendants executed an assignment of their property for the benefit of their creditors. Both instruments describe the same property. The said firm of Creglow Bros. had then no property excepting their said stock of goods. Within a short time after the execution of said mortgage and assignment, the other defendants in this case, being creditors of said partnership, commenced actions on their claims, and attached the property, thus disregarding the mortgage and assignment. Thereupon this action was commenced against the creditors, and the question involved in the case requires a determination of the validity of the mortgage. The plaintiff claims that it was taken to secure a just debt, and the defendants insist it is void upon several grounds. If the mortgage is held to be void on any issue raised by the answer, there is then no question that the liens of the attaching
1 creditors are valid. The partnership of Creglow Bros. consisted of Charles Creglow and George Creglow. At the time the mortgage and assignment

were made, George was twenty-four and Charles twenty-seven years old. The plaintiff is their father. The two sons had been in the mercantile business for several years. Their first venture in that line of business was at Guttenburg, in Clayton county, in the year 1891. There is evidence which tends strongly to show that their father was then a partner in the business. That business was closed out by a sale of the stock in trade in April, 1892. The plaintiff was a partner with one Millan in a store at Glen Haven, Wis., and the partnership was dissolved by a division of the stock in trade, and the two sons of the plaintiff took their father's share of the property and started a store at Northwood, in this state, where they continued in business until March, 1893, when they moved their store to Waseca, Minn., and they remained there until July, 1894. In the month of August in the same year, they removed to Hampton, where they continued in the same business until they closed out by executing the mortgage and the assignment in controversy in this case.

II. The defendants claim that the mortgage was void, as against them as creditors, on the following grounds: (1) That the instrument is without consideration, and was made to hinder, delay, and defraud creditors; (2) that the plaintiff was a secret member of the firm of Creglow Bros.; (3) that the plaintiff and Creglow Bros. and one Beddow, whom they made assignee, entered into a conspiracy to secure a large quantity of goods on the credit of Creglow Bros., and that, when so secured, they should be transferred to the plaintiff to pay his claim; (4) that the mortgage was a part of a general assignment made by Creglow Bros., and is void, in law, because it prefers the plaintiff. It is not our purpose to set out the evidence. To do so would unduly extend this opinion. We do not believe that the facts as disclosed in the testimony,

would sustain a finding of the alleged secret partnership, and it would be error to hold that the mortgage was without consideration; and, while there is evidence tending to show that there was an understanding between the father and sons that the store was to be stocked up so as to be sufficient in value to secure the debt due to the plaintiff, yet we do not think the decision of the case should be put upon that ground. But we believe that the decree should be affirmed upon the ground that the mortgage is void because it was part of the transaction which culminated in the assignment, and in so holding, we think all of the evidence which it is claimed support the other defenses should be considered.

III. Section 2115 of the Code is as follows: "No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid unless it be made for the benefit of all his creditors, in proportion to the amount of their respective claims." This provision of the statute has many times been under consideration by this court, in connection with cases involving the validity of a mortgage, or mortgages, and a general assignment of the property of the mortgagor. It has uniformly been held that, if the mortgage is executed without any reference to a general assignment, and afterwards, and as an independent transaction, in no manner connected with the mortgage, and upon an intention formed after the making of the mortgage, a general assignment is made, the mortgage, if taken without fraud and in good faith, for the payment of an honest debt, is valid. See *Bradley v. Bailey*, 95 Iowa, 745 (64 N. W. Rep. 758), and cases there cited. The same case, and many others, hold that if the two acts,—the making of the mortgage, and the general assignment,—are one transaction, and both made in pursuance of an intention to make a general

assignment, they amount to a general assignment with preference, and the mortgage is void under the statute. See *Elwell v. Kimball*, * (69 N. W. Rep. 286). The question to be determined, under the facts and circumstances disclosed in evidence, is whether the plaintiff's mortgage is a valid instrument. We will not recite the testimony of the witnesses. It will be sufficient to state, in a general way, the facts which we regard as established by the evidence. When the plaintiff sold his sons the stock of goods which was removed to Northwood, the consideration of the sale was about four thousand dollars, which was evidenced by promissory notes. The business at Northwood and at Waseca resulted in a loss, and when the old stock was removed from the last-named place to Hampton, the sons had no other property liable to execution. All of their business enterprises were failures. The debt to the father was increased by drafts upon him, until, at the time they removed to Hampton, it amounted to nearly the sum for which the mortgage was given. It quite satisfactorily appears, from the acts of the sons, that they did not at any time contemplate to continue in business at Hampton. The plaintiff was at the place about the time of the removal. They were unable to pay the freight charges for the shipment of the goods, and the plaintiff furnished them with one hundred and fifty dollars for that purpose. When they removed to Hampton, one of them sent his family and his household furniture to South Dakota, where they remained, and he went

proper and requisite for the trade in that locality. They were indebted in the sum of nearly fifteen thousand dollars to wholesale merchants when the mortgage and the assignment were made. These debts were contracted with about ninety wholesale dealers in different parts of the country, and the debts were contracted within a short time before the failure. They knew they were bankrupt, and could not make payment for the goods. In short, the debts were contracted by a gross fraud and misrepresentation, and the plain inference, from all the facts, is that they intended to accumulate a large stock in trade, and then fail. Now, as we have said, the plaintiff must have known that this was their purpose. It is true they all testified as witnesses that such was not the intention. But the testimony of the sons in reference to their acts in the matter is unworthy of credit, and the father, being a business man and a banker, must have known that his sons were pursuing a fraudulent course of dealing. He ought to be held to have known that no wholesale dealer would have extended credit to his sons if it had been known that they were indebted to their father greatly in excess of any property which they owned. This being the condition of affairs, the father procured his son-in-law, named Beddow, and an attorney, to go to Hampton and take the mortgage. In a very short time after that, the assignment was made. The acknowledgements of both instruments were taken before the same officer, and he testified that the acknowledgement of the assignment was taken from twenty to thirty minutes after the acknowledgement of the mortgage. The parties to the transaction testified that the time was about an hour, and they

2 further testified that there was no intention to execute the assignment until after the mortgage was acknowledged and filed for record.

Beddow, the son-in-law of the plaintiff, was made assignee. The taking of the assignment was advised by the attorney of the plaintiff. It was plainly a part of the same transaction as the mortgage. It was taken as a protection to the mortgagee; and, considering all the facts which we have stated, we think the court rightly held that the two instruments constituted a general assignment with a preference, and that the mortgage is void. The decree of the district court is **AFFIRMED**.

**HEMAN HEMSTREET V. MELVINA C. WHEELER AND
ELLEN HEMSTREET, Appellants.**

Deed from Parent: FRAUD AND UNDUE INFLUENCE: Evidence. A deed made by a father and mother to their daughter, of property of the value of six thousand to seven thousand dollars, on a consideration approximating three thousand dollars, and a further agreement to support the grantors, who were both over seventy years old, during the remainder of their lives, will not be set aside at the suit of another heir of the grantors, where the evidence fails to establish fraud or undue influence on the part of the grantee, or the incapacity of the grantors.

Appeal from Polk District Court.—HON. S. F. BALLIET,
Judge,

FRIDAY, DECEMBER 11, 1896.

SUIT in equity to partition certain real estate, of which it is claimed one Nicholas Hemstreet died seized. The defendant Melvina C. Wheeler claims to own the property by virtue of a conveyance thereof to her by Nicholas Hemstreet and Ellen Hemstreet, during the lifetime of the said Nicholas. The plaintiff, in reply, admits the conveyance relied upon by the defendant Wheeler, but says that the same was without consideration, or, if for any consideration, that the same was nominal only; and this conveyance was obtained through fraud and undue influence. Plaintiff further alleges that at the time

the conveyance was made, Nicholas Hemstreet was so weak in body and mind as to be incapacitated from making the deed, and that, by reason thereof, and of the fraud and undue influence practiced by defendant Wheeler, the deed relied upon by her is void, and of no effect. On these issues the case was tried in the court below, resulting in a judgment and decree for plaintiff as prayed. Defendants appeal.—*Reversed.*

Gatch, Connor & Weaver for appellants.

Dudley & Coffin for appellee.

DEEMER, J.—The real issue in the case, as will be observed from the foregoing statement, is as to the validity of the conveyance from Nicholas and Ellen Hemstreet to the defendant, Mrs. Wheeler. This conveyance was made on the ninth day of January, 1889, and recorded on the eleventh day of January of the same year; and the expressed consideration for the same is four thousand six hundred dollars. For reasons hereafter to be stated, another deed was afterward executed between the same parties, bearing date September 9, 1891, recorded September 10, 1891, covering the property in controversy. Nicholas Hemstreet died, intestate, on the third day of October, 1891. He left surviving him, plaintiff, a son, Mrs. Melvina C. Wheeler, a daughter, and Ellen Hemstreet, his widow. But for the deeds to which we have referred, plaintiff and each of the defendants would be entitled to an undivided one-third of the property in controversy, as only heirs of the said Nicholas Hemstreet. The only question in the case relates to the validity of these deeds. The exact claim made by the plaintiff, with reference to them, is that they are inoperative and void, for want of consideration, or, if

any consideration, only a nominal and inadequate one; that the conveyances were obtained by the importunity, overpersuasion, and undue influence of defendant, Melvina C. Wheeler; that the grantors, by reason of age and sickness, were incapacitated to transact business; that they were living with Mrs. Wheeler, and had no opportunity to act independently; and that the conveyances were secured for a selfish purpose, and said conveyances would not have been executed except for the importunity and overpersuasion of the daughter, Melvina C. Wheeler. At the time of the making of the first deed, the Hemstreets also conveyed to Mrs. Wheeler, one hundred and sixty acres of land in Polk county, Iowa, and two lots in the town of Altoona. The legal title to the property was in the name of Ellen Hemstreet, and the expressed consideration in the deed was one dollar. The real consideration, however, seems to have been an agreement on the part of the grantee to care for and support the grantor during her life. This conveyance is not attacked by the plaintiff, and, as defendant, Mrs. Hemstreet makes no complaint, but seems to be satisfied with it, there is no occasion for referring to it further.

The first question to be considered is as to the consideration for the conveyance to Mrs. Wheeler. This inquiry is not for the purpose of defeating the conveyance because of an entire lack of consideration, for the reason that it is elementary that a deed expressing a consideration cannot be defeated, nor a trust established by evidence of this character. Jones, Real Prop. sections 301, 302, 309. This feature of the case is material, as it bears upon the question of fraud and undue influence, for, if it be found that the elder Hemstreet was weak in mind, and easily susceptible to the influences of those in whom he placed his confidence, the adequacy, or inadequacy, of the consideration

for the conveyance is a question of much moment. The facts, as disclosed by the record, are as follows: Mrs. Wheeler was married in the year 1859. She did not live agreeably with her husband, and in the year 1878, was divorced from him. See *Wheeler v. Wheeler*, 53 Iowa, 511 (5 N. W. Rep. 689). Some time before she obtained her divorce, she quit living with her husband, and took up her abode with her parents, with whom she lived, and for whom she worked, until the time of the conveyance in question. In the divorce proceedings she obtained certain alimony from her husband. The lots so obtained she sold, and the proceeds she loaned, to her father, Nicholas Hemstreet. She also loaned him other amounts of money in 1884 and 1886, and she also, at her father's request, paid some of plaintiff's notes, the amount of which the father agreed to repay her. At the time of the conveyance in question, the estimated amount due Mrs. Wheeler from her father by reason of these loans and advances was eight hundred dollars. At the time of the conveyance, the value of the daughter's services to her parents was estimated at two thousand one hundred and forty-four dollars, and, as a part of the transaction, Nicholas Hemstreet executed the following paper: "Des Moines, January 9, 1889. Received of Melvina Wheeler \$2,144.00 on work and services from January, 1878, to January, 1889, same to apply on and in payment of the property deeded to her this day, we having settled upon, and both of us agreed on, that amount as compensation for her services for the time above referred to. [Signed] Nicholas Hemstreet." Upon her part, and on the same date, Mrs. Wheeler gave to her father the following: "In part consideration for certain real estate deeded to me on this 9th day of January, 1889, by Nicholas Hemstreet, I hereby agree to faithfully care for and support my father, Nicholas Hemstreet, and

my mother, Ellen Hemstreet, during their natural lives, and I hereby enjoin my children, in case of my death, that they fully carry out this agreement. [Signed] Melvina C. Wheeler." These various matters constituted the consideration for the deed. Nicholas Hemstreet was seventy-four years of age, and his wife about seventy-eight, at the time these conveyances were made, and their expectancies were six and five years, respectively. The value of the property conveyed is not clearly shown. At the time of the trial, all of the property conveyed to Mrs. Wheeler by her parents was worth probably fifteen thousand dollars, and we are inclined to believe that the property covered by the deed in question was worth, at the time of the transfer, from six thousand to seven thousand dollars. If these be the facts, was the consideration inadequate? It seems to us, in view of all the circumstances above recited, that it will not do to say that it was so inadequate, of itself, as to raise even a suggestion of fraud or undue influence. It is said, however, that at the time the conveyance was made, Nicholas Hemstreet was so weak in body and mind that he was incapable of making the deed; or, if this be not true, that his faculties were so weak as to render him easily susceptible to the influence and machinations of others. It appears from the evidence that Hemstreet had an attack of la grippe some time during the fall of the year 1890, and that from that time until his death he was somewhat indisposed. The immediate cause of his death was cancer of the stomach. He was around, attending to the ordinary duties of life, until a few weeks before his death, but had evidently suffered from the fatal malady for two or three years before he succumbed. There is some evidence to the effect that his mental faculties were impaired as early as 1889, but it is entirely from non-experts, most of whom were but slightly acquainted with him, and few of whom saw

him often. Quite a number of plaintiff's own witnesses gave it as their opinion that he was perfectly sane, and capable of attending to his business. On the other side, we have the testimony of all the physicians who were called upon to treat him, men who are eminent in their profession, and whose attention was specifically directed to his condition of body and mind; the evidence of many non-experts, who knew him well, and were intimately associated with him; and the presumptions in favor of sanity which always obtain in such cases. Without setting forth any of the evidence upon which we rely, it is sufficient to say that we are constrained to believe that the plaintiff has failed to prove the allegations of incompetency relied upon by him.

It is argued, however, that while Hemstreet may have been competent, in a legal sense, to execute the conveyance, yet that his mind was so enfeebled on account of age and sickness that he was easily influenced, and that Mrs. Wheeler took advantage of this fact, and by her persuasion, importunity, and coercion secured the conveyance. We have examined the evidence relating to this issue with great care, and do not find that the claim is sustained. Plaintiff's counsel argue that the conveyance was made under a misapprehension of the facts, arising from the fact that Mrs. Wheeler supposed that plaintiff had received his full share of his father's estate, which was, in fact, untrue, and they refer to the evidence relating to a certain two thousand dollar transaction, which Mrs. Wheeler claims was given by Nicholas Hemstreet to his son in the year 1885, and insist that no such gift was made. This circumstance, even if found in favor of the plaintiff, is by no means conclusive. But we are not prepared, in view of the evidence submitted, to find that plaintiff did not receive this money. The circumstances point very strongly to the conclusion that he

did receive it. But, be this as it may, we do not, as we have said, regard it as controlling, for the evidence shows affirmatively, as we think, that no undue, or unfair, advantage was taken of Nicholas Hemstreet. Nor do we think the defendant, Wheeler, used any such influence to induce him to make the conveyance as will vitiate the transaction. A very potent circumstance in the case is the making of the second deed by Nicholas Hemstreet and wife to their daughter, Mrs. Wheeler, in September, 1891. A man by the name of Crawford is the scrivener who drew this deed. Crawford was requested by Hemstreet to call at his house. Pursuant to this request, Crawford went to the place where deceased was living, and was informed by him that he wanted to leave his property to Mrs. Wheeler, and wished to know how he should do it. Crawford suggested the making of a will, but Hemstreet said in reply that he had already deeded all his real estate to Mrs. Wheeler upon the advice of an attorney; that this was better than to make a will. Hemstreet said that all the property he had left was a few promissory notes, and at the suggestion of Crawford, these notes were transferred to Mrs. Wheeler. At the same interview Hemstreet asked Crawford to look over some deeds that an attorney had drawn a year or two before. This Crawford did, and on examination discovered that the description in one was written upon a separate piece of paper, and attached to the deed. This was the one of June 9, conveying the property to Mrs. Wheeler. Hemstreet inquired of Crawford if the deed "was all right." Crawford suggested the making of a new one, and to confirm his opinion telephoned to Des Moines, and asked the advice of an attorney there, who also advised the making of a new instrument. Pursuant to these suggestions, Nicholas Hemstreet and wife executed to Mrs. Wheeler the deed of

date September 3, 1891. This last-named deed was witnessed by two witnesses, and was filed for record, as before stated. Mrs. Wheeler was present at the time this deed was made, but she had no particular part in the transaction, and the conversation had at the time clearly indicates that the grantor understood well the nature of the business he was transacting, the character and extent of his property, and the disposition he wished to make of it. He also recognized the former deed made to Mrs. Wheeler as binding, and made the new one in order that there might be no question regarding its validity. As we have said, we do not think that Nicholas Hemstreet was at any time incapacitated, by reason of his mental condition, from transacting business. We are well satisfied that he made the conveyances to his daughter upon an adequate, although perhaps not a full, consideration, understanding full well the nature and effect of the deeds. We are also constrained to believe that they were made voluntarily, and without fraud, over-persuasion, or undue influence. Finding these conveyances valid, it follows that the judgment and decree of the district court must be, and it is, **REVERSED**.

100	290
115	320
100	290
128	23

**HEMAN HEMSTREET, Appellant, v. MELVINA WHEELER,
ELLEN HEMSTREET, W. T. INGLE, and SUSAN
PRUNTY, Intervener, Appellees.**

Trusts. An assignor of a judgment of foreclosure cannot, under McClain's Code, section 8105, requiring all declarations of trusts relating to real property to be executed in the same manner as deeds, establish a resulting trust in the property, by parol proof of an agreement by the assignee of the judgment, to hold it for him.

SAME: Parol evidence. Parol evidence is inadmissible to show that the assignee of a decree of foreclosure, under a written assignment absolute on its face, agreed to buy in the property on the sale under the decree, and hold it for the assignee. Compare *Patterson v. Mills*, 69 Iowa, 755.

Appeal from Polk District Court.—HON. S. F. BALLIET,
Judge.

FRIDAY, DECEMBER 11, 1896.

SUIT in equity to establish and enforce a trust in certain lots in the town of Altoona, Polk county, Iowa, and to recover the rents and profits thereof. The court below found in favor of the defendants, and the plaintiff appeals.—*Affirmed.*

Dudley & Coffin for appellant.

Gatch, Connor & Weaver and *W. G. Harvison* for appellees Melvina Wheeler and Ellen Hemstreet.

Read & Read for appellees W. T. Ingle and Susan Prunty.

DEEMER, J.—The material facts, as disclosed by the record, are as follows: In or about the month of February, 1870, plaintiff, as the owner of certain lands in Polk county, Iowa, sold and conveyed the same to

one Blakesley, who, to secure the purchase price, gave plaintiff some notes and a mortgage upon the property. Blakesley failed to pay the notes when due, and plaintiff brought suit thereon to foreclose his mortgage, and obtained judgment and decree in the sum of one thousand nine hundred and thirty-four dollars. Plaintiff was, at the time of obtaining judgment, having trouble with his wife. A separation had taken place between them, and a division of their property had been agreed upon. And plaintiff claims that, to avoid trouble and complications likely to arise from taking title to the property in his own name at foreclosure sale, he, acting on the advice of an attorney, assigned his claim and cause of action on the notes, without consideration, to his mother, Ellen Hemstreet. After the assignment, Mrs. Hemstreet purchased the property at foreclosure sale, bidding the amount of the judgment therefor, and on or about April 22, 1872, she sold or exchanged the said real estate, with the consent of plaintiff, to one Cree, for the lots in question. The title to the lots, however, was taken in the name of Mrs. Hemstreet. On January 9, 1889, Mrs. Hemstreet conveyed the premises to her daughter for the expressed consideration of one dollar. This conveyance is referred to in the case of *Hemstreet v. Wheeler*, ante, 282 (69 N. W. Rep. 518). It is claimed that Mrs. Wheeler acquired title to the lots with full knowledge of plaintiff's rights, and that the conveyance was obtained through fraud and undue influence practiced by Mrs. Wheeler upon her mother, who, it is claimed, was old and feeble, and subject to imposition and wrong. Afterwards the property was conveyed by Mrs. Wheeler to defendant Ingle, and Ingle conveyed an undivided one-half interest therein to the intervener, Prunty. Both Ingle and Prunty claim to be good faith purchasers without notice. The defendants

Weeler and Hemstreet deny the claims made by plaintiff, and also plead the statute of limitations.

Counsel for appellant now concede that defendant Ingle, and intervener, Prunty, were good-faith purchasers of the lots for value, and they admit that a trust cannot be enforced against them. They do insist, however, that under the facts established, they are entitled to a judgment against Mrs. Wheeler for the full value of the premises, which they allege to be one thousand dollars, and for the rents and profits of the lots. The assignment of the Blakesley claim and decree to Hemstreet, before referred to, was in writing, and is as follows: "Heman S. Hemstreet vs. Jacob Blakesley, et al., Messrs. Goode & St. John, Attorneys: I assign and transfer all my rights, title, and interest in and to the judgment obtained in the above case at the January term of the circuit court of said county, the notes secured by mortgage, all made exhibits to the petition, and also the mortgage made an exhibit herein, meant to secure said indebtedness, the originals of which are all in your hands as my attorneys, to Mrs. Ellen Hemstreet, and you will be governed by her and in accordance to the same. February 26, 1872. [Signed] Heman S. Hemstreet." Plaintiff's version of the transaction, as given by him on the witness stand, is as follows: "The notes and mortgage had been foreclosed, and the sheriff's sale was about to take place. My wife was then living in Wisconsin, and a written article of separation had been entered into between us. My father advised the assignment in this form to mother for the purpose of not having it in my hands in the trouble with my wife. It was done to avoid difficulty in transferring real estate. I talked with my mother about her taking the title to this property before it was transferred. When I talked about transferring the property, mother said to transfer to her; she would keep it; and I could have it

in the future, when I got a divorce. Subsequently, my wife and I were divorced, and this property was conveyed to David Cree for other property. I talked with father about it. Father said Mr. Cree could use it, and he would trade it to Mr. Cree for his house and property,—for lots 1 and 2, block 2, of Ensign's addition. That trade took place before I went to Kansas, and the property was conveyed to David Cree. The title to the property conveyed by Mr. Cree for the hotel property was taken in the name of my mother, Ellen Hemstreet." His claim, from this evidence, is that a resulting trust is established in the lots, which he is entitled to establish and enforce.

Now, while there is no direct evidence disputing the plaintiff's testimony, yet we are by no means satisfied that he has given us the correct version of the transaction. But, if it be conceded that he has, we are not prepared to hold that he is entitled to judgment against either Mrs. Wheeler or Mrs. Hemstreet. The assignment of the judgment and decree was absolute on its face, and imported a consideration; and plaintiff cannot recover unless he be permitted to show by parol that this assignment was without consideration, or was in trust for his use and benefit. To show that he furnished the consideration for the Cree lots, he must establish an express trust in the property exchanged for them. This he is not permitted to do. *Hain v. Robinson*, 72 Iowa, 735 (32 N. W. Rep. 417); *McClain v. McClain*, 57 Iowa, 167 (10 N. W. Rep. 333); *McGinness v. Barton*, 71 Iowa, 644 (33 N. W. Rep. 152); *Kellum v. Smith*, 33 Pa. St. 158; *Dunn v. Zwilling*, 94 Iowa, 233 (62 N. W. Rep. 746); *Acker v. Priest*, 92 Iowa, 610 (61 N. W. Rep. 235); *Thorp v. Bradley*, 75 Iowa, 50 (39 N. W. Rep. 177). It may be that, if the evidence related solely to the judgment, and if the trust to be established had no connection with real estate, the evidence would be admissible under the rule

announced in *Patterson v. Mills*, 69 Iowa, 755 (28 N. W. Rep. 53). But to establish a trust in the Cree lots it is necessary for the plaintiff to show that his mother took the Blakesly property also in trust. To do this he must prove that when she took the assignment of the decree she agreed to purchase the property at sheriff's sale, take a deed to the same, and hold it for the use and benefit of the plaintiff. This would be a clear violation of section 3105 of McClain's Code, which requires all declarations or creations of trust in relation to real estate, to be executed in the same manner as deeds of conveyance. It was not the mere chose in action plaintiff held against Blakely that was assigned to Mrs. Hemstreet, for it was in contemplation by both parties that she should take title to the real estate covered by the mortgage, and hold it for the benefit of the plaintiff. Again, the assignment, as we have said, is in writing, and, on its face, is absolute. To permit the plaintiff, as against Mrs. Hemstreet, to prove the claims he now makes, would allow him to change, vary, and modify this written instrument by parol. This cannot be done without overturning one of the most elementary principles of evidence. The decree of the district court is right, and it is **AFFIRMED**.

JOSEPH VENATOR V. NELS SWENSON AND SARAH SWEN-
SON, Appellants.

100	295
4122	300

100	295
133	611

Specific Performance: CONDITIONAL LAND SALE. A contract for the exchange of lands, entered into by one of the parties thereto, upon condition that his wife should consent and join with him in the conveyance to be made under the contract, is conditional, and cannot be specifically enforced, against husband or wife, unless the wife consents so to do.

Appeal from Wapello District Court.—HON. F. W.
EICHELBERGER, Judge.

FRIDAY, DECEMBER 11, 1896.

ACTION for a specific performance of a contract to convey real estate. Decree for plaintiff, and the defendants appealed.—*Reversed.*

W. S. Coen and *W. W. Cory* for appellants.

Steck & Smith and *W. H. C. Jaques* for appellee.

GRANGER, J.—The petition shows that the plaintiff and the defendant, Nelson Swenson, entered into an agreement for the exchange of lands, the plaintiff to pay a difference of three hundred and fifty dollars; that Nelson and Sarah Swenson are husband and wife; that deeds of conveyance of the respective lands were to be made and delivered about February 1, 1893; that the plaintiff has complied, or was ready to, in all respects, comply with the terms of the agreement on his part, and that the defendants have neglected and refused so to do on their part, and a specific performance is asked, and there is a prayer for general relief. The defendants answered jointly, denying the making of such a contract, but admitting that a proposition

for such an exchange was made by plaintiff, and accepted by defendant Nelson Swenson, on condition that his wife should consent thereto, and sign the deed. It is made to appear from the answer that Sarah Swenson would not consent to the sale, and would not sign a deed in pursuance of it, and that the land in question constituted the homestead of the defendants. The answer charges fraud on the part of plaintiff in representing the value of the real estate he proposed to exchange, and that he clandestinely and fraudulently entered upon the land in question, and matter is presented by way of counter-claim. A reply puts in issue the averments of the answer as to a liability on the counter-claim. The district court entered a decree for performance by both defendants, and providing that, in case of a failure to execute a conveyance, the decree should have that effect. There is no claim that Mrs. Swenson was a party to the contract of sale. We do not think it important to consider the question of homestead right or fraudulent representations as to value. This case, in most of the essential facts, is like that of *Zundelowitz v. Webster*, 96 Iowa, 587 (65 N. W. Rep. 835). We think that appellees do not seriously contend that a decree of performance should be against Mrs. Swenson. She is so plainly within the rule of this court, where such relief is denied, that we need not do more than cite, in addition to the above case, *Leach v. Forney*, 21 Iowa, 271; *Presser v. Hildenbrand*, 23 Iowa, 483; *Zebbley v. Sears*, 38 Iowa, 507; and *Mining Co. v. McAdam*, 38 Iowa, 663. More than this, we think

from plaintiff's evidence, that he asked Swenson about his wife, and Swenson said: "What I agree to do, she does." A witness for plaintiff said: "Heard Swenson say to Joe, that his wife would not sign the deed for less than three hundred and fifty dollars. Swenson said: 'What I do is all right with my wife.'" This evidence shows that the parties understood that the wife was to sign the deed. On the other side, there is much evidence to the effect, that the acceptance of the proposition for an exchange of lands was made on condition that Swenson's wife was satisfied, and would unite in the deed. It is a fact, that the twenty dollars were paid to Swenson on the contract, but there is also evidence tending to show that Swenson took it conditionally. One Spousler, a witness for defendants, after stating other facts, said: "Mr. Venator threwed a gold piece—ten or twenty dollars—on the counter, asked Mr. Swenson to take it, and that would bind the deal. It laid there quite a bit, probably ten minutes. Then Mr. Venator went over to the counter and took the gold piece, and put it into Swenson's hand, and says, 'Take that.' Mr. Swenson says, 'No, I can't take it as a forfeit, because I can't make the deed without my wife's consent.'" The testimony of the plaintiff and his son is to the effect that Swenson did not want to take the money, or trade, until he saw his wife, and that he offered the money back, and plaintiff would not take it, but agreed to go to Swenson's home and talk the matter over with his wife. It is true, there is considerable testimony tending to show an absolute agreement, but the most favorable construction to be placed on all the evidence is that plaintiff and Swenson believed, from the talk, that the trade would be completed, because they agreed as to the terms, and they believed that Mrs. Swenson would sign the deed. Because of this belief, many statements were, likely, made as if

the trade was complete. Such statements are not unusual under such circumstances. It seems to us that this case is like hundreds of others, where men meet and fix the terms of sale of land, and fix a time of performance, tacitly, if not otherwise, understanding that the wives will concur, and with no expectation of the transaction being completed without such concurrence. Such experience is a matter of common knowledge among men of affairs, so that it may be considered in reaching conclusions from particular facts in evidence. We should hesitate before granting a decree for specific performance from plaintiff's own evidence, because it appears therefrom that the matter of the wife's signing the deed was considered; and we do not conclude from Swenson's statement, that his wife would do as he did, that he designed to be bound that she would do so, but only that, from past experience, he had no doubt she would in this case. There is not a word in the evidence to show an intention on his part to trade unless she concurred, nor do we think that the plaintiff thought, or had reason to think, Swenson so intended. The defendant's have not appealed, and no question arises on the counter-claim. Our conclusion is that the judgment should be reversed, and that plaintiff's petition should be dismissed.—REVERSED.

EDWARD H. PRIOR V. JOHN SCHMEISER AND MARY
SCHMEISER, Appellants.

Contracts: SUBSTANTIAL PERFORMANCE: Construction. A contract for a monument, after giving the exact dimensions of various parts, provided for a "cap, the same as cap on the T monument," which was of larger dimensions than the one called for by such contract. *Held*, that the contract did not call for a cap of the precise dimensions of that on the T monument, but one substantially the same as that, in material, design, style, and workmanship, and dimensions suited to the smaller monument ordered.

Appeal from Clayton District Court.—HON. L. E. FELLOWS, Judge.

FRIDAY, DECEMBER 11, 1896.

ACTION to recover upon a contract, whereby plaintiff agreed to furnish and place a monument, as specified, for the defendants, in the cemetery at Council Hill, Iowa, for three hundred dollars. Defendant's admit the contract, and that a monument was furnished and placed, but deny that it is such as is called for by the contract. Verdict and judgment were rendered in favor of the plaintiff. Defendants appeal.—*Affirmed.*

James E. Corlett and *James O. Crosby* for appellants.

D. D. Murphy for appellee.

the same as the cap on the Tapper monument. This monument to be made of the same kind of granite as Chas. Snell's monument." The only fault found by the defendants, in their answer, with the monument furnished and placed is "that the cap placed upon said monument is much smaller in dimensions and size, of less value, and of inferior workmanship and finish to the one on Tapper's monument." The evidence shows without conflict that Tapper's monument is of larger dimensions than the one called for in this contract, and that the cap furnished by plaintiff is the same in material, workmanship, and design, as the cap on Tapper's monument, but is somewhat smaller in dimensions, and the molding is not cut so deep. The court, after stating the issues, instructed as follows: "To entitle the plaintiff to recover, it is not necessary that the cap on the monument in question should be of the exact proportions or size as that upon the Tapper monument. It is sufficient if it be shown to be substantially the same in style and finish, and of such proportions as to present the same general appearance, as that upon the Tapper monument, and so be of such proportions as to properly correspond with the monument on which it was placed. If from the evidence you find plaintiff has thus substantially complied with the contract, you will find for plaintiff for three hundred dollars. If you do not so find, you will find for the defendant." It was the province of the court to construe the contract, and to tell the jury just what must be shown to constitute a performance of it.

II. This action is upon the contract, and to recover thereon the plaintiff must show that he has performed the contract in the particular in issue,

an acceptance or stipulation is pleaded, and, therefore, many of the authorities cited are not applicable. In construing the contract, we must seek for the intention of the parties. It was clearly their intention that the monument should be in proper proportions in all its parts, and symmetrical as a whole. It will be observed that, while the contract specifies the dimensions of the two bases, it does not specify, in feet or inches, the dimension of the cap. The evidence shows, what is manifestly true, that, to have a symmetrical monument, the several parts must be in proper proportions. It also shows that the Tapper monument was somewhat larger than the dimensions called for in this, that the cap thereon was in proper proportion, and somewhat larger than this cap. Evidence was introduced showing the rule or usage among monument builders as to the proportions that the several parts should bear to each other. Appellant contends that this evidence is inapplicable; that it seeks to change the contract; and quotes from *Chicago v. Tilley*, 103 U. S. 155, as follows: "Proof of usage can be received only to shown the intention or understanding of the parties in the absence of a special agreement, or to explain the terms of a written contract. In all cases where evidence of usage is received, the rule must be taken with this qualification: that the evidence is not repugnant to or inconsistent with the contract." As these parties contemplated a symmetrical monument, and as the contract does not specify the dimensions of the cap, we may resort to usage in arriving at their intention with respect to the dimensions of the cap. In *Eastern Granite Co. v. Heim*, 89 Iowa, 698 (57 N. W. Rep. 437), the contract provided that the inscription on the monument should be in German. It was in German words, but in Latin lettering, and this court said: "It is claimed this is not in compliance with the contract;

but the court has, we think, correctly permitted the plaintiff to prove that it was usual to use the Latin lettering in German inscriptions on granite monuments." It is urged that, as the cap was to be the same as the cap on the Tapper monument, the parties must have intended that it should be so in dimensions as well as in all other respects, regardless of whether or not it would be in proper proportions with the monument to be furnished. The defendants are entitled to just what their contract calls for, but we think it was not understood as calling for a cap of the precise dimensions of that on the Tapper monument, but one the same as that in material, design, style, and workmanship, and of dimensions suited to the monument which it was to crown. If A contracted for a hat for his own wear, to be the same as B's hat, and B's hat was too large or small for A, it would hardly be contended that the contract was not performed by furnishing a hat like B's of the size to fit A. If plaintiff had furnished a cap of the dimensions of the cap on the Tapper monument, and it was out of proportion to the monument for which it was furnished, he would not be heard to say that it was the same as Tapper's and to compel the defendants to take the monument crowned with a disproportioned and consequently unsightly cap.

Defendants complain of the use of the word "substantially," in the instruction quoted above. The same complaint was made in *Loftus v. Riley*, 83 Iowa, 505 (50 N. W. Rep. 18), and this court said: "We think it was rightly used. It did not justify any

first-class trees, and this court said: "Substantial performance of its contract was what the plaintiff was bound to prove; not a technical, exact, and perfect performance, but such a performance as the parties contemplated at the time they made the contract." We think there was no error in admitting the evidence complained of, nor in giving the instruction quoted above, and that the verdict has ample support in the evidence. The judgment of the district court is therefore **AFFIRMED**.

GEORGE ENGLE & COMPANY, Appellees, v. CHARLES LOFLAND, Trustee, Appellee, A. W. SWALM AND THE KRATZER CARRIAGE COMPANY, Appellees, S. B. JONES AND THE OSKALOOSA NATIONAL BANK, Interveners, Appellants, JOSEPH A. JONES, Defendant, Appellant.

100 303
116 342

Services by Child: PRESUMPTIONS AS TO COMPENSATION. Before a son can recover for services rendered to his father, while a member of his father's family, he must rebut the legal presumption that such services were rendered gratuitously, by satisfactory evidence.

SAME: Evidence. On the issue of a father's liability for wages for services rendered by a son while a member of the family, the presumption that such services were rendered gratuitously, and the father's denial of any agreement to pay wages, are not overcome
1. by the son's testimony and a book, kept by him without his father's knowledge, which shows that accounts had been altered, that the entries were not made at the time they purported to be, and that the memoranda of alleged settlements were made at one time.

Decree: WHO MAY BENEFIT BY: Pleading. A creditor who has not

Appeal from Mahaska District Court.—HON. D. RYAN,
Judge.

FRIDAY, DECEMBER 11, 1896.

JOSEPH JONES, the father of the appellant, Joseph A. Jones, on November 4, 1893, executed to appellee, Lofland, trustee, a chattel mortgage on his personalty to secure an indebtedness to appellant, the Oskaloosa National Bank, also a claimed indebtedness of two thousand five hundred dollars on a note to his son, Joseph A. Jones. At the time of the execution of this mortgage, Joseph Jones was insolvent. On the day on which said mortgage was executed, plaintiffs commenced an action in the district court of Mahaska county, Iowa, against Joseph Jones, on certain promissory notes, aggregating about seven hundred dollars, the action being aided by attachment, and the Oskaloosa National Bank and Lofland being attached as garnishees. Thereafter, and in the order named, A. W. Swalm and the Kratzer Carriage Company commenced suits in the same court against Joseph Jones, aided by attachment, and garnished the same parties. Judgment was entered against Joseph Jones in each of said cases. November 20, 1893, the defendant, Lofland, trustee, foreclosed his chattel mortgage by notice and sale, realizing therefrom about two thousand eight hundred dollars. Plaintiffs, in their petition, alleged the insolvency of Joseph Jones and Joseph A. Jones. They charged that the note for two thousand five hundred dollars, given by Joseph Jones to Joseph A. Jones, was fraudulent as to the creditors of said Joseph Jones, and asked that the trustee be restrained from paying any portion of the proceeds of the sale of the mortgaged property to Joseph A. Jones, and that he be directed to apply that portion which would have gone to Joseph A. Jones, on the

claims of the plaintiffs. They also asked and secured a temporary injunction restraining the payment of any money to Joseph A. Jones. Thereafter A. W. Swalm and the Kratzer Carriage Company intervened in said suit, and claimed the same relief. Appellant, the Oskaloosa National Bank, intervened in said cause, and alleged that Joseph Jones was indebted to it in the sum of two thousand one hundred and fifty dollars, and interest on two notes, and the further sum of three thousand dollars, as guarantor of certain notes which he had sold to said bank; that he had executed to Lofland, trustee, a chattel mortgage to secure the two notes first mentioned, and also to secure the bank to the extent of two thousand dollars from damage or loss by reason of the non-payment of the guaranteed notes; that the property had been sold, and the proceeds were held by the trustee for distribution. It prayed that all the proceeds might be paid to it. Appellant S. B. Jones intervened, alleging that Joseph Jones executed a note to the Oskaloosa National Bank (being one of the two notes on which the bank claims); that she signed said note as surety for said Joseph Jones, and that one thousand seven hundred dollars, with interest, was due thereon; that Joseph Jones executed the mortgage heretofore mentioned, to Lofland, trustee, to secure the payment of said note; that it had been foreclosed, and the proceeds were in the hands of said trustee; that said proceeds were insufficient to satisfy the sums secured by said mortgage; that the mortgage from Joseph Jones to Joseph A. Jones was fraudulent. Joseph A. Jones answered plaintiff's peti-

that he held a mortgage for two thousand five hundred dollars, that he secured the appointment of the trustee, and denied all other allegations of said petition. He asks that the entire amount in the hands of the trustee be turned over to him in payment of his mortgage. From the answers of the garnishees it appears that Trustee Lofland sold the mortgaged property, and that, after paying expenses, there remained in his hands about two thousand eight hundred and thirty-two dollars, to be paid to whoever is entitled thereto. The attachment proceedings were all consolidated with the main case, and tried as one action. The district court found that the note given by Joseph Jones to Joseph A. Jones, and secured by the chattel mortgage, was fraudulent and void as against plaintiff and the interveners Swalm, the Kratzer Carriage Company, and S. B. Jones; that Joseph Jones was not indebted to Joseph A. Jones when said note was given; that Joseph A. Jones, at the time of the alleged debt, was living with his father as a member of his father's family, and was supported and maintained by his father; and that no agreement existed between them that the father should pay for the son's services. The court also finds: That the attaching creditors and S. B. Jones are entitled to that portion of the funds in the hands of the trustee arising from the sale of the mortgaged property, which would have gone to Joseph A. Jones had the mortgage not been fraudulent as to him, to be paid to them in the following order: *First*, to plaintiffs; *second*, to Swalm; *third*, to the Kratzer Carriage Company; and, *fourth*, to S. B. Jones. That the bank is entitled to that portion of the fund in the hands of the trustee that, under the terms of said mortgage, it would have been entitled to as against Joseph A. Jones had the mortgage been valid as to him. Further orders were made as to the basis of prorating the funds of the trustee, not now necessary

to be more fully noticed. From this decree, Joseph A. Jones, S. B. Jones, and the Oskaloosa National Bank appeal.—*Affirmed.*

J. B. Bolton for appellant Joseph A. Jones.

Geo. W. Seevers for appellants Oskaloosa National Bank and S. B. Jones.

J. C. Morgan for appellees.

KINNE, J.—I. As to the appeal of Joseph A. Jones: The court below found that Joseph Jones was not indebted to his son, Joseph A. Jones, at the time the note was executed by the father to the son, and that said note was fraudulent and void as against creditors heretofore mentioned. The appellants insist that this finding is not in accordance with the evidence. The senior Jones had for a great many years, and up to the time of his failure in 1893, been engaged in the business of manufacturing carriages in Oskaloosa, Iowa. Joseph A. Jones entered his father's service in said business when about sixteen years of age, and continued to work in the business until shortly before his father's failure. During all of these years, until 1891, Joseph A. Jones was a member of the family of his father, lodging and boarding with the family, and being clothed by his father. It appears that the father, from time to time, gave the son money, and paid his bills, of which no account was kept. When the son was sixteen years of age, he began working in the father's factory at the agreed price of seventy-five cents per day. That agreement, however, is not relied upon by the parties in this controversy. The son claims that, when he was twenty years of age, the father agreed to pay him thereafter one dollar per day and board. This arrangement, it is claimed, was made

January 1, 1878. The son also claims that on October 11, 1883, he had a settlement with his father, at which time there was found due the son, after allowing all proper credits, the sum of nine hundred dollars. He also claims that this balance due him was to be paid by transferring to him a one-third interest in the business after his father got out of debt. Another settlement is claimed to have been had on January 1, 1886, when the father executed a note to the son for one thousand one hundred and fifty-nine dollars and eighty-five cents, the balance then claimed by the son. A new agreement is claimed to have been entered into at that time as to the wages to be paid the son, and a further arrangement on January 1, 1887, which continued until August, 1892, when a settlement was had, and a note for two thousand five hundred dollars executed by the father to the son, which is the note in controversy in this action. The father denies all of these agreements and settlements testified to by the son, except he admits the execution of the two notes mentioned. Up to January 1, 1891, Joseph A. Jones kept his father's books, which showed the details of the business, including the employes' accounts and the amounts paid each of them as wages. During all of these years, from January, 1878, up to January, 1891, no account appears in the father's books with the son, excepting a few items in the year 1880, aggregating about five dollars. After January 1, 1891, the father kept the books, and opened an account with the son, to whom he was then paying wages; and, as appears, from that time, until he ceased working for his father, he received in money more than his wages amounted to. The only account kept of the work claimed to have been done by Joseph A. Jones for his father prior to 1891, or of the money paid him, was entered in a small pass book by Joseph A. Jones himself; and we think it appears that it was never examined by the

father, and for a long time he had no knowledge that such a book was being kept by the son.

The rule was laid down in *Scully v. Scully's Ex'r*, 28 Iowa, 548, that "when it is shown that the person rendering the service is a member of the family of the person served, and receiving support therein, a presumption of law arises that such services were gratuitous; and in such a case, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of rendering, compensation therefor." See, also, *Saar v. Fuller*, 71 Iowa, 425 (32 N. W. Rep. 405); *Manufacturing Co. v. Mastin*, 75 Iowa, 112 (39 N. W. Rep. 219); *Chadwick v. Devore*, 69 Iowa, 640 (29 N. W. Rep. 757); *Magarrell v. Magarrell*, 74 Iowa, 380 (37 N. W. Rep. 961). The appellant, Joseph A. Jones, having rendered the services, for which it is claimed the note in controversy was given, while a member of the family of his father, the burden is on the son to overcome the presumption which the law raises, that such services were rendered gratuitously. The claim of appellant is that the services were rendered under an express agreement to pay therefor, and he so testifies. In support of this claim, he introduced a pass book which he kept, and which contains entries purporting to show the number of days he worked for his father, and the amount of money paid him by his father. All the entries in it, except those touching claimed settlements, are in pencil, and have the general appearance of being made at one time. Many of them show clearly that the figures have been changed, and others substituted. The entries relating to settlements, though referring to settlements claimed to have been made with an interval of years intervening, appear to have been made with the same ink and

pen, and at the same time. These alleged settlements the father expressly denies, and says he never saw the entries. Some evidence was introduced on both sides as to statements made by the father to various parties, touching an indebtedness to the son. These statements are conflicting. The father explains giving the one thousand one hundred and fifty-nine dollar note, saying he did it to save having a fuss in the family. As to the note now in controversy, he said: "Well, I couldn't settle with him without having some kind of a statement of the account, and told him to that effect; and he went to work and made the statement out at once, in two or three days getting it out. He finally brought it to the shop one afternoon, when I was very busy, working for some men at the time; and he had a roll of papers where he had made that out, and he said it was in there, and it was all figured out, and said there was a balance of two thousand five hundred dollars. He left the statement on my office desk in there, and I was to look through that when I had the leisure, and, if there was anything wrong about it, we would rectify it. I signed the note, and the men waiting on me at the time. I went away, and left the note and that statement with Joe. Joe took that statement with him, and put it in his pocket. and that is the last I ever saw of that statement." He says he never examined the statement; that he did not know how much he owed the son at that time. All the testimony of the father relative to this last note may be entirely consistent with his claim, that the only agreement he ever made with the son, was to work for seventy-five cents per day; and inasmuch as no account had been kept in the father's books, with the son, and the father had from time to time paid the son money, and paid his store bills, he had no means of actually knowing the condition of matters between them. However, as we have

already said, the claim of the son is not based in any manner on the original arrangement admitted by both father and son, whereby the former was to pay the son seventy-five cents per day. We do not think that it is shown that the father had knowledge of the contents of this book, kept by the son, so that it can be said that he in any manner assented to the correctness of the entries therein contained. The fact that the son, who was the bookkeeper, did not keep his account with his father in the father's books, the manner in which the account has been changed, the indications that the entries were not made at the time they purport to be, and the fact that the memoranda of the alleged settlements appear to have all been made at one time, with the same ink, as well as many other facts which might be recited, convince us that, as evidence, the book is not reliable. Nor is the explanation which the son gives as to why he did not keep his account on the father's books, satisfactory or reasonable. It will not do to say that this book, kept by the interested party, and under the circumstances we have in part recited, and showing numerous changes and alterations, should be deemed sufficient, in connection with the testimony of Joseph A. Jones, to overcome that of his father, and of the presumption which the law raises against his right to recover for the services which he has rendered. A careful examination of all the evidence fully warrants the conclusion reached by the district court as to this branch of the case.

II. As to appellant, the Oskaloosa National Bank: The appellant claims that the court erred in its order of distribution of the proceeds of the mortgaged property in the hands of the trustee. They claim
2 that the bank should first have its claim paid in full, regardless of the attaching creditors. The funds in the hands of the trustee are insufficient to pay the bank's claim. It will be remembered that

the district court ordered paid to the interveners and plaintiff "that portion of said funds which, under the terms of said mortgage, would have gone to the defendant, Joseph A. Jones;" and that, "for the purpose of prorating the said fund, the share going to plaintiff and interveners shall be based on the sum of \$2,500, being the amount of the alleged claim of A. Jones, the defendant; and that the share going to the Oskaloosa National bank shall be based on the sum of \$2,150, plus amount of notes on which Joseph Jones is collaterally liable to said bank as guarantor, which are covered by said mortgage, and which are found uncollectible and worthless." Now, the bank did not attack the note for two thousand five hundred dollars, given by Joseph Jones to Joseph A. Jones, and secured by the mortgage, as being fraudulent. No such issue was made by it. So far, then, as the bank is concerned, its right to the fund collected under the mortgage is to be measured and determined as if the note and mortgage given to Joseph A. Jones were valid and binding obligations. Not having pleaded fraud as to the note and mortgage, the bank is in no situation to claim the benefit of a decree, which, as between other parties and Joseph A. Jones, finds said note and mortgage fraudulent.

III. As to the appeal of S. B. Jones: S. B. Jones signed, as surety for Joseph Jones, one of the notes which he gave to the Oskaloosa National Bank, and which was secured by the mortgage given to the bank, and to Joseph A. Jones. She asks that the fund in the trustee's hands be all applied in payment of the bank's claim, so that she may be relieved of liability. She claims she should be preferred to the claims of the attaching creditors. The trustee was

She had not acquired any lien on the fund, and we discover no reason for disturbing the decree as to her. In view of the disposition made of the case, we do not pass upon the motion of appellees. The decree below is, as to all of the appellants, **AFFIRMED**.

JOHN HARPHAM, v. W. S. WORTHINGTON AND C. U.
BRADFIELD, Sheriff, Appellants.

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128 668

Execution Sale: CANCELLATION: *Construction of statute.* A judgment creditor who has caused execution to be issued, and has bid upon the property levied upon, a larger amount than the judgment and costs, and permits a return on such sale to be made by the sheriff, cannot, by a mere choice, treat the sale as a nullity and issue a second execution, and have other property seized and sold thereunder, even, though it does not appear whether the costs were paid or not.

SAME: *Collateral attack of sale.* In an action to cancel a judgment and a levy on and sale of land, it appeared that such judgment had been satisfied by a previous sale of land, under an execution on it, and the second sale was void. It was asked that the judgment be renewed, and made a lien on the land, and that the sheriff be ordered to resell the land, if the court found the second sale void. *Held*, that defendant was not entitled to the relief asked, even if the allegation of the answer was true, without proceedings to set the first sale aside.

Appeal from Wright District Court.—HON. B. P.
BIRDSALL, Judge.

FRIDAY, DECEMBER 11, 1896.

ACTION in equity to cancel a certain judgment against plaintiff in favor of defendant Worthington, and a levy and sale of certain real estate under an execution issued thereon, and to quiet the title to said real estate in the plaintiff. Decree was rendered in favor of the plaintiff. Defendants appealed.—*Affirmed*,

McGrath & Bryan for appellants.

Peterson & Humprey for appellee.

GIVEN, J.—I. There is no controversy as to the facts in this case, and those necessary to be considered are as follows: On February, 7, 1877, the defendant, Worthington, obtained a judgment against plaintiff, Harpham, for two hundred and sixty-one dollars and twenty-nine cents, with interest at — per cent. per annum, and for twenty-three dollars and sixty-six cents attorney's fees, and five dollars and seventy-five cents costs. On September 18, 1878, Worthington caused a general execution to issue on said judgment, upon which return was made as follows: "This execution came into my hands for service on the nineteenth day of September, 1878, at eleven o'clock A. M.; and on the twenty-fourth day of September, 1878, I levied upon the following described real estate, to-wit: The N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 10, Tp. 90, range No. 26 west of the 5th P. M., Iowa; and on the twenty-fourth day of October, 1878, I sold said land to W. S. Worthington, for three thousand one hundred and fifty dollars. N. Malvin, Sheriff." It does not appear what further, if anything, was done under this execution sale. On the fifth day of December, 1894, the defendant, Worthington, caused another general execution to issue on said judgment, which was placed in the hands of the defendant, Bradfield, sheriff, for service. The sheriff's returns show that on the sixth day of December, 1894, he levied said execution upon forty acres of land, and, after giving the notices required, did, on the eighth day of January, 1895, sell the same to W. S. Worthington for seven hundred and eighty-six dollars and sixty-four cents. and executed to him

by this writ I am commanded; and said writ is returned satisfied in full by said sale."

II. Plaintiff contends that the first sale was a satisfaction of the judgment, and therefore asks that it and the second sale be canceled. Defendant Worthington contends that the first sale was abandoned, and therefore the judgment was not satisfied, and that he was entitled to the second execution, and is now entitled to the land under the sale made on the second execution. The first sale was for three thousand one hundred and fifty dollars, an amount sufficient to satisfy the judgment, and it must be held to have satisfied it, unless it appears that said sale was, in some authorized way, set aside. It does not appear whether or not the costs were paid under the first sale, nor whether a sheriff's certificate or deed was executed in pursuance of it, but it is a familiar rule that we must presume that the sheriff did what the law required. Defendants cite section 3089 of the Code, providing that, when the purchaser fails to pay the money, the plaintiff may proceed against him; "otherwise, the sheriff shall treat the sale as a nullity, and may sell the property on the same day, or after a postponement." They also cite *Reese v. Dobbins*, 51 Iowa, 282 (1 N. W. Rep. 540), wherein it is held that where the plaintiff in execution is the purchaser, and fails to pay costs, the sheriff may treat the sale as a nullity, and adjourn it until another day. In this case the sheriff did not treat that first sale as a nullity, and proceed to sell again, but, by his return, treated it as a complete sale. The sheriff having so treated it, we must presume that the execution plaintiff paid the costs, and that the sale was in all respects complete.

A plaintiff in execution who bids in the property, and permits a return of the sale to be made, cannot by mere choice, on his part, treat the sale as a nullity. If for any cause, he would have

the sale set aside, he must do so by proper proceedings. In *Downard v. Crenshaw*, 49 Iowa, 296, it is said: "We conclude, therefore, where real estate has been levied on under an execution, that such levy must be disposed of by a sale or abandoned, as provided by statute, or set aside by a court, before a second execution can issue, except as provided in section 3086 of the Code, and other property levied on and sold. It follows that the second execution, and all proceedings thereunder, must be set aside." It is further said: "In the case at bar the plaintiff in execution is the purchaser, and no money except costs was to be paid; and it would seem that in such case the execution debtor, and not the sheriff, should have the right to elect whether the sale should be regarded as abrogated or not." With the presumptions that arise from the return on the first execution, we must hold that a complete sale was made; that the judgment was fully satisfied thereby; and that plaintiff is therefore entitled to have the judgment and second sale canceled. Defendants, in their answer, say that said first sale was abandoned; that no transfer of the land has been made; and ask that said judgment be renewed, and made a lien on the land, and that the sheriff be ordered to resell the land, "if the court find that said sale is void." We do find that the second sale is void, and it may be true as alleged, though not proven, that no transfer of the land has been made under the first sale; yet defendants are not entitled to the relief asked merely by electing to abandon a strictly legal sale. Mr. Worthington is not entitled to such relief until, by proper proceedings, he has that first sale set aside.

Much is said in the pleadings and argument as to plaintiff's homestead right in said land, but, in the view we take of the case, it is unnecessary to consider that subject.

For the foregoing reasons, we conclude that the decree of the district court is correct, and it is therefore **AFFIRMED**.

J. R. RODGERS, Appellant, v. THE INDEPENDENT SCHOOL DISTRICT OF COLFAX.

100	317
111	25
100	317
123	201
100	317
129	444
129	540

Selection of School Site: REVOCATION. A school board selected an old site whereupon to erect a new schoolhouse, which was in contemplation, and ordered an election on the question of issuing
 1 bonds to build. The resolution ordering the election used the words "if practicable," with reference to placing the building on the old site. The notice of election recited that it was proposed to issue bonds to build on the old site and the ballots used, so indicated.
 3 *Held*, after these bonds were voted, the board could not use the bonds voted to build on a new site, especially where it does not appear that the old site was impracticable.

COURTS AND COUNTY SUPERINTENDENT. McClain's Code, section 2985, declaring that any person aggrieved by any decision of the district board of school directors may appeal to the county superintendent, does not prejudice the right to an appeal to the courts, upon questions involving the authority of the board of directors.
 2

Appeal from Jasper District Court.—HON. A. R. DEWEY, Judge.

FRIDAY, DECEMBER 11, 1896.

THIS is a suit in equity, by which the plaintiff seeks to enjoin the defendant district from appropriating the proceeds of certain schoolhouse bonds to erect a school building on any other location than upon the same site which has heretofore been used for schoolhouse purposes. It is admitted in the answer that the district, by its school directors, had purchased a new site for a schoolhouse, and it is averred that said directors had the legal right to select the site of the proposed new building. A temporary injunction was granted, and, upon a hearing upon the pleadings and evidence, the temporary injunction was dissolved,

and the petition was dismissed. Plaintiff appeals.—*Reversed.*

H. S. Winslow for appellant.

J. C. Cook and *C. O. McLain* for appellee.

ROTHROCK, C. J.—I. The case was submitted to the district court upon the pleadings, and upon an agreed statement of facts. No evidence, aside from the agreed stipulation, was introduced by either party. It appears from the pleadings, and the statement of facts, that the plaintiff is and has been a resident, taxpayer, and voter in said independent district. On the twenty-sixth day of April, 1895, the board of directors of the district adopted a resolution submitting to the voters a proposition to issue bonds, not exceeding fifteen thousand dollars in amount, for the purpose of erecting a schoolhouse. In pursuance of this resolution, a notice of the election was properly given, in which the time for the election was fixed for the fifteenth day of May, 1895. It was recited in the notice of the election that "an opportunity would be given the electors to vote on the location of the new school building," and that "a ballot box for that purpose would be provided." The result of this election is set out in the agreed statement of facts as follows: "(4) That the ballot used at this election was in accordance with the terms of the notice provided for the expression of the choice of the voter as to the site upon which the schoolhouse should be erected, and there were cast at the election one hundred and sixty-six votes for bonds, two hundred and twelve votes against bonds, one hundred and fourteen votes for a
1 new site, and two hundred and fifty-seven votes

by which the question of voting twelve thousand five hundred dollars in bonds to erect a schoolhouse "on the old site, if practicable," was ordered to be submitted to the voters. A notice of this election was duly given, and the electors were advised thereby that it was proposed to issue "bonds not to exceed \$12,500 to build schoolhouse on old site." This last election was held on the twelfth day of June, 1895. The ballots cast at this election were in the following form:

SPECIAL ELECTION.

on
ISSUING BONDS FOR \$12,500.00

To build schoolhouse on old site.

FOR BONDS.

AGAINST BONDS.

To vote "for bonds" scratch off the words,
"Against Bonds."

To vote "against bonds" scratch off the words,
"For Bonds."

These ballots were so marked that there were two hundred and twenty-eight votes cast "for bonds," and fifty-eight votes "against bonds." In about one week after this last election, the board of directors passed a resolution by which a committee of the board was appointed to purchase another site for the new building, and on the twenty-fourth day of July, 1895, at another meeting of the board, a resolution was passed, by which the board authorized a purchase of three full lots, half of another lot, and part of still another lot, for a site for the proposed new schoolhouse. At the time this resolution was passed, there was no money in the district treasury belonging to the schoolhouse fund, except the proceeds of the bonds which had been voted, and which the board had

then sold. It does not appear what price was paid for the lots purchased. It was, however, paid by using part of the proceeds of the sale of the bonds which were voted to erect a new building on the old site. The last paragraph of the agreed statement of facts is as follows: "(13) That the board of directors, after the vote was taken and the bonds were sold, changed their minds as to the site, giving it as their opinion, that it was not practicable to erect a new schoolhouse upon the old site." It ought to be stated, further, that the resolution to buy the lots for a new site provided that, if certain lots could not be purchased, then that the board "proceed at once to build on the old site;" and no question of the practicability of the old site was stated in the notice of the election, nor on the ballots, and the vote was for a building to be erected on the old site, and not elsewhere.

The contention of the appellee is that the school board is the only authority clothed with the power to select schoolhouse sites, and that the vote, in so far as it was a direction to build on the old site, was void, and not binding on the board; and it is urged that the district court had no jurisdiction of the controversy, because the only remedy to which appellant

was entitled was an appeal to the county superintendent of schools. This last-named question requires very brief consideration. It is provided by section 2985 of McClain's Code, that "any person aggrieved by any decision or order of the district board of directors in matters of law or fact may

2 * * * appeal to the county superintendent;" and, under section 2991, "an appeal may be taken from the decision of the county superintendent to the superintendent of public instruction, * * * and the decision when made shall be final." It has been held

Perkins v. Board, 56 Iowa, 476 (9 N. W. Rep. 357), it is said: "The courts of the state are arbiters of all questions involving the construction of the statutes, conferring authority upon officers and jurisdiction upon special tribunals. It was certainly never the intention of the legislature to confer on school boards, superintendents of schools, or other officers discharging *quasi* judicial functions, exclusive authority to decide questions pertaining to their jurisdiction and the extent of their power. All such questions may be determined by the courts of the state." And very many such cases have been determined by this court in which jurisdiction was entertained without question. The very question presented by this record is whether the board of directors are, under the statute, clothed with authority to change the location of the proposed schoolhouse after the bonds were voted and sold.

II. It is conceded by counsel for appellant that the board of directors have the authority to fix the location of proposed schoolhouses; but it is contended that, under the facts of this case, that power was exercised when the last election was held, and the
3 vote recorded. It may be that in the absence of the action of the board in taking the sense of the voters to issue bonds and build the house on the old site, and if the bonds had been voted without condition, the directors might lawfully select a new location. Of course they were required to make the selection and locate the building at a place where the inhabitants of the district and the patrons of the school would be reasonably provided with school facilities. Their authority can not be arbitrarily and unreasonably exercised; and when they have once located the site of a new building, and the electors and taxpayers vote for bonds to erect the same at the designated place, the power, having been exercised,

cannot be revoked, unless for some controlling reason. It is to be conceded that, in the resolution ordering the last election, the words "if practicable" were used in connection with the designation of the old site. But in the notice to the electors, and on the face of the ballots, there was no such condition. It was a square vote to issue bonds and build on the old site. The result of the first election demonstrated conclusively that if the words "if practicable" had been inserted in the notice for the last election, and on the ballots, no bonds would have been voted. The school directors (defendant) ought not now to be permitted to abandon the old site, and expend any part of the proceeds of the bonds in purchasing a new location, and erecting a building thereon. The bonds were not voted for any such purpose. It is useless to further elaborate the case. There is nothing in this whole record which tends to show that the old site was impracticable, except the fact that the directors "changed their minds as to the site." It was averred in the answer that it was not practicable to build on the old site; but there is no evidence to sustain that issue. We have said that the board designated the old site as the one selected, before the election was held. By that we mean that the notice of election fixed that location absolutely, and the ballots cast ratified and approved it; and, if the board properly recorded the proceeding, the face of the record fixed the site, and it remained so until the directors changed their minds. We need cite no authority in support of the plain and

voting bonds in a way that might seriously prejudice the interests of school districts. The decree of the district court is REVERSED.

100 323
107 466

F. D. AND J. W. YOUNG, Appellants, v. ELLA F. SWAN
AND E. R. SWAN.

Mechanic's Lien: CONTRACT: Ratification by wife. The fact that a wife knew that materials purchased by her husband on credit
1 from plaintiff were used in her house does not amount to a ratification of the husband's acts, where it is shown that the wife furnished the husband with money to pay for all purchases made
2 for her house, and had no knowledge that any were made on credit.

PAYMENT BY WIFE: Application on husband's general account. Where a wife furnished the husband with money to buy lumber for her house, and he purchased the same with such money from
2 the plaintiff, with whom he had a general account for lumber, without directing on whose account the amount paid should be applied, plaintiff cannot apply the amount on the husband's general account, in order to claim a mechanic's lien on the property of the wife.

Appeal from Hamilton District Court.—HON. D. R. HINDMAN, Judge.

FRIDAY, DECEMBER 11, 1896.

SUIT in equity to establish and foreclose a mechanic's lien against the property of Ella F. Swan, for lumber and building materials sold and delivered. Ella F. Swan, in answer, denied that she ever made or authorized any contract for the purchase of lumber of plaintiffs, and states that she had no knowledge that any material of plaintiffs went into the house which was built on a certain lot owned by her. Her husband, E. R. Swan, admits that he purchased lumber of plaintiffs during the years 1889 and 1890, but he denies that he ever purchased any in his wife's name. He further says that he purchased and paid for the lumber which

went into his wife's house, but that plaintiffs failed to give credit therefor. He further pleads that plaintiff's account is not just and true, and that it contains items which plaintiffs well knew did not go into his wife's house. The lower court dismissed the prayer for a lien, and plaintiffs appeal.—*Affirmed.*

Wesley Martin for appellants.

D. C. Chase for appellees.

DEEMER, J.—The evidence shows that the plaintiffs sold and delivered to the defendant, E. R. Swan, who was a contractor and builder and owner of what was known as the "Novelty Works," various and sundry items of lumber and building material during the years 1888, 1889, 1891, and 1892, amounting in the aggregate to more than one thousand four hundred dollars. This lumber was all sold and charged upon the books to the defendant, E. R. Swan. Various payments were made upon this account, and the balance due May 19, 1892, as shown by plaintiff's books, was three hundred and twenty-six dollars and seventy cents. The plaintiffs seek to establish a mechanic's lien upon the property of Ella F. Swan for the sum of four hundred and thirty-nine dollars and eighty-one cents, claiming that they made a contract with her by which they agreed to furnish this amount of lumber for the construction of a building upon lots No. 3 and 4, in block 101, in Dubuque & Pacific Railroad addition to the city of Webster City. This alleged contract is denied by both defendants, and defendant, E. R. Swan, denies that the items shown by the exhibit attached to plaintiff's petition went into the house built upon his wife's land. Defendant, Ella F. Swan, pleads that she never authorized any one to purchase lumber of the plaintiffs,

and that she did not know that any lumber was purchased of them on credit. She further says that she supposed all the material going into her house was paid for. The plaintiffs do not claim to have made any contract with the wife for the sale and delivery of the lumber for which they now seek to establish a mechanic's lien; and it clearly appears that all their dealings were with E. R. Swan, and that the charges made upon their books were against him alone. They attempt to sort out and identify the lumber which went into Ella F. Swan's house, by entries upon their journal following each item of charge for which they claim a lien in these words, "for house." It is manifest, however, from the evidence, that these entries were not all made at the time the charge was entered; and it further appears, beyond controversy, that many of these items did not go into the house which was built on Mrs. Swan's land. It is true, plaintiffs say they relied upon the property as security; but it further appears that plaintiffs did not know in whom the title was at the time they sold the lumber, and did not know whether it was incumbered or not. To establish their claim, they rely upon the agency of the husband for the wife, and the further fact that the wife knew their material was being used in the construction of her house. With reference to this last claim, it may be that the wife knew that lumber purchased of plaintiffs was being used in her house; but it is shown beyond all controversy that she supposed it had been fully paid for before delivery, and there is no showing whatever that she knew it was being purchased on credit. There is evidence to the effect that she furnished her husband with the money with which to purchase the lumber which went into her house, and that she supposed all material was fully paid for; and there is positive evidence from the husband that he did pay for all lumber which he used in his wife's house, although

this is denied by one of the plaintiffs. This much, however, is certain: that defendant E. R. Swan paid to plaintiffs much more than the amount of their present claim; and it further appears that during the time this lumber was being used, defendant E. R. Swan paid to plaintiffs more than the amount of the bill they furnished for the house. It is also shown that E. R. Swan advanced to plaintiffs, during this time, more than he was owing them; in other words, that he paid in advance for some of the lumber furnished for the house which was being built on the land of his wife.

There is no evidence from which a ratification of the husband's acts in purchasing the lumber for the house can be inferred, for the reason that there is no showing that the wife knew the lumber was being purchased on credit. Indeed, the fair inference from the evidence is that the wife furnished the husband with the money with which to pay for all the material, and supposed that it was all paid for at the time it was delivered. She was about the house two or three times during the course of its construction, it is true; but, as she had provided the means with which to pay for the lumber, she cannot be held on the theory that she ratified her husband's acts. The most that can be claimed for appellants is that the wife furnished the husband with money with which to purchase the material for the house; that he purchased it of plaintiffs, paid them the money which she had given him, but did not direct that it be applied upon this particular account; and that plaintiffs applied it on general account. We doubt very much whether this

state of facts is shown; but concede that it is;
2 how stands the case? The wife furnishes the husband with money with which to buy a bill of lumber. The husband goes to a material man with whom he has a general account, purchases the lumber, pays the money which his wife has given him to

the merchant, and the merchant applies it upon the general account. Can he now, in an action to establish and foreclose a mechanic's lien against the property of the wife, insist that these payments of the wife's money shall be applied upon the husband's general account, to the detriment of the wife? We think not. The husband could not directly appropriate this money to his own use against the consent of the wife, and it surely is not the province of a court of equity to misappropriate it. *Gleaton v. Tyler* (S. C.) (21 S. E. Rep. 333); *Stewart v. Woodward*, 28 Am. Rep. 488. But, aside from this, we are constrained to believe that the defendant, E. R. Swan, when he paid plaintiffs the money which had been furnished by his wife, directed that credit be given upon the items of account for lumber which went into her house. This defendant testified positively that he gave such directions, and the plaintiffs do not squarely deny it. They rely upon their books, and these do not, except in two instances, show any particular application of payments. Again, it appears that on the next day after the husband purchased the first of the lumber for the house, he paid the plaintiffs two hundred and fifty dollars. This was more than the balance due on his whole account; and it is manifest that it was at that time understood that more lumber was to be purchased, and that the amount of the payment should, at least, be credited on the account for lumber for the house. The evidence shows that all the items for the house account have been paid, and plaintiffs are not entitled to a lien against it. Moreover, the evidence as to what was furnished for the house, and what on general account, is very unsatisfactory. A great many of the items for which plaintiffs claim a lien did not go into the house; and it further appears that there were some credits which should have been allowed

which do not appear upon the statement for a mechanic's lien filed by the plaintiffs.

Although not a controlling point in the case, we may observe that there is much to be said in favor of appellees' position that plaintiffs did not file a just and true statement or account of the demands due them, as required by statute. It may be that this was unintentional, but, whatever may be the truth regarding this matter, we do not think they are entitled to a lien against the property. The case of *Price v. Seydel*, 46 Iowa, 696, lends support to our conclusions.—
AFFIRMED.

100	328
107	31

100	328
113	299

ELLA BENSON V. THE DISTRICT TOWNSHIP OF SILVER LAKE, DICKINSON COUNTY, IOWA, Appellant.

Contract with Teacher: APPROVAL BY PRESIDENT: *Estoppel*. Code section 1753, provides that a sub-director of a school board, under
1 the rules of the board, may contract for employment of a teacher, and that the contract shall be approved by the president and reported to the board. *Held*, that where a contract was made with a teacher, and signed by a director, who was, in fact, at the time,
2 president of the board of directors, and filed with the secretary, his failure to approve the contract as president, and file it with the board of directors, did not render the contract invalid.

SAME: *Subsequent change of authority to employ*. A school board authorized its president to employ plaintiff as teacher for the "winter term." No provision was made as to what number of weeks constituted such term. The president employed plaintiff for the term of nine months. *Held*, that a subsequent action of the board, whereby it attempted to correct the record, by stating that the board of directors employed teachers for six months only, and that the president was authorized to close contracts for "six months only,—the winter term," did not affect the contract entered into with plaintiff; assuming, even, that the teacher would be bound by resolutions of the board, of which she had no actual knowledge.

DISCHARGE OF TEACHER: *Hearing*. Under Code, section 1734, a
4 school teacher cannot be discharged before the expiration of her term, without an opportunity to be heard.

Appeal from Dickinson District Court.—HON. W. B. QUARTON, Judge.

FRIDAY, DECEMBER 11, 1896.

SEPTEMBER 23, 1893, the plaintiff entered into a contract in writing, in the usual form, by the terms of which she was to teach the school in district No. 1, of defendant, for the term of nine months, commencing October 2, 1893, and was to receive therefor the sum of thirty-five dollars per month, to be paid at the end of each month. The contract was signed by the plaintiff and by the secretary of the defendant's board; also, by "L. E. Benson, Director." Benson was, in fact, at the time, the president of the defendant's board of directors. The contract was made and signed in duplicate, and left with the president of the board. It was, however, never formally signed by him, as president. It was filed by the secretary of the board. Under this contract, plaintiff entered upon her labors, and taught the school for six months. She was prohibited by the defendant from teaching longer. She was fully paid for the time she actually taught. She brings this suit to recover for the three months which she was not permitted to teach. The defendant pleads, among other defenses, that the contract was made without authority of defendant, and in violation of the terms of a resolution which had been adopted by its board of directors, which authorized Benson to employ the plaintiff for the winter term only, being for the period of six months; that the contract was void, it not having been filed with the president of defendant, and not being signed and approved by the defendant's president. To this, plaintiff replied that defendant had repeatedly recognized the validity of the contract, by making payments thereunder, and by accepting plaintiff's

services, with knowledge of its terms, and that it was now estopped from claiming that it was invalid. The cause was, by agreement of parties, tried to the court, without a jury, and a judgment rendered against the defendant for one hundred and thirty-eight dollars and sixty-five cents, and costs. Defendant appeals.—*Affirmed.*

J. W. Cory for appellant.

C. M. Brooks for appellee.

KINNE, J.—I. Of the many questions discussed by counsel, we shall only consider those which impress us as controlling, in the determination of the case.

Did the plaintiff have a valid and binding contract with the defendant? By section 1753 of the Code, it is provided, that "the sub-director, under such rules and restrictions as the board of directors may prescribe, shall negotiate and make in his sub-district, all necessary contracts for * * * employing teachers * * * All contracts made in conformity with the provisions of this section, shall be approved by the president, and reported to the board of directors, and said board, in their corporate capacity, shall be responsible for the performance of the
2 same on the part of the district township."

This contract was made on behalf of the district township, by a proper person. It was not formally approved by the president, and it does not appear that it was ever filed by him, or reported to the board of directors. Clearly, his failure to report the contract to the board, would not render it invalid. That was a duty the law enjoined upon the directors for a failure to perform which, the teacher was in no way responsible. Nor do we think, that the failure of the president of the board to file the contract, should

prevent recovery. It was left with the director making it. He was, in fact, the president of defendant's board. If he approved the contract, it was his duty to file it.

Is the contract of no validity because not formally approved by the president of the board? As we have seen, the law required such contracts to be thus approved, and we have held that, if such a contract is not approved, it is not binding upon the district. *Gambrel v. District Township of Lenox*, 54 Iowa, 418 (6 N. W. Rep. 693). So, also, we have held that, if a contract is made in conformity with the section of law heretofore quoted, it is the duty of the president of the board to approve it. *Thompson v. Linn*, 35 Iowa, 361. In this case the contract was filed by the secretary of the board. It was left with the president. As the president had, as a director, entered into the contract with plaintiff, it can hardly be presumed that he did not regard it as complying with the law. If it was not a proper contract, if it did not comply with the law, he, as a director, had no right to enter into it. It will not do to say that, as president of the board, he did not know of the terms and conditions of a contract which he himself, as a director, had entered into. Under the facts disclosed in this record, we think the contract cannot be defeated by the fact that the president of the board did not formally approve it.

II. At a meeting of the defendant's board held September 19, 1893, L. E. Benson, a member of the board, and its president, was authorized to employ plaintiff as a teacher in the Lake Park School for the "winter term." No provision was made as to what number of weeks should constitute a term. Now, the contention is that, under said authority, Benson had no right to employ plaintiff for a longer period than six months; that plaintiff is bound to know the action of the board; and hence her contract for nine months is

invalid. Whether plaintiff, under the circumstances disclosed in this record, or under any circumstances, would be bound by this action of the board, of which she had no actual notice, we do not determine. The resolution itself is indefinite as to the number of weeks or months the winter term should embrace. It did not therefore limit the time to six months. That the board so understood it, long after the expiration of the time provided in plaintiff's contract, is evident, for at a meeting held January 30, 1895, they attempted to explain or correct the record thus: "It was moved and seconded that as the record made September 19, 1893, by the secretary of the board, is incorrect, and a part omitted by mistake, that the same be corrected by adding thereto that the board of directors employed said teachers for the term of six months only,—the winter term; and that L. E. Benson was authorized to close contracts for six months only,—the winter term." This subsequent attempted correction and explanation of the record could not bind plaintiff as to a contract entered into long before it was made. There are several facts in evidence which go to show that the plaintiff was prevented from teaching longer than six months, not because the contract was in excess of the authority conferred upon Benson as to time, but on account of a claim that she had not properly conducted the school. This was one of the grounds stated at a board meeting held in March, 1894; and, when the secretary of the board notified plaintiff that her services were no longer wanted as a teacher, the reason given did not relate to the fact or claim that the contract was unauthorized, being made for nine months, instead of for six months, but the reason given was: "Your term as teacher is considered closed, the cause being for not fulfilling agreement of contract."

But we need not prolong this discussion. We do not find it necessary to consider questions raised as to ratification and the like. We hold the contract, in form and under the circumstances disclosed, was
4 legal and binding for the nine months. Plaintiff's discharge before the expiration of the term, and without an opportunity to be heard, was unwarranted. Code, section 1734; *Hull v. School District*, 82 Iowa, 688 (46 N. W. Rep. 1053, and 48 N. W. Rep. 82). The judgment of the district court is **AFFIRMED**.

LUCY JONES V. THE CITY OF CLINTON, Appellant.

Defective Street: NEGLIGENCE OF CITY. Where, on the breaking of a water pipe, a plumber is employed by a lot owner to repair it, and makes an excavation in the street without any permit from the city, and the officers of the city have no actual notice of the excavation, and a person, at about twilight, drives into the excavation, while the laborer has necessarily absented himself from the work, for a few minutes, the city is not liable.

Appeal from Clinton District Court.—HON. A. J. HOUSE,
Judge.

FRIDAY, DECEMBER 11, 1896.

ACTION at law to recover damages alleged to have been sustained by the plaintiff by being thrown out of a buggy while traveling on one of the streets of the defendant city. There was a trial by jury; verdict and judgment for the plaintiff. Defendant appeals.—*Reversed.*

C. H. George and McCoy Bros. for appellant.

No appearance for appellee.

buggy, drove the horse into an open ditch or trench, and they were thrown out of the vehicle in which they were riding, and the plaintiff claims that she was seriously injured. The action is grounded upon the alleged negligence of the city in not protecting the traveling public from injury by reason of the trench in the street. The accident occurred in the evening, between twilight and dark. There were lights in some of the stores on the street. No lights were necessary to discover the trench in the street. The earth taken from the excavation was deposited in the street. A man on a load of hay, across the street, saw the obstruction, and called aloud to Jackson, warning him of the danger. The trench was dug by the employes of Kendall & Co., plumbers, engaged in plumbing, digging trenches, and repairing water pipes. A service water pipe in the street burst, and, in order to repair it, the employes of Kendall & Co. made the excavation. One of these employes was examined as a witness in behalf of the plaintiff. The following is part of his testimony: "I don't know the exact date of this accident. I remember of the accident, and it was on the day of that accident that I commenced work, not on the day before. I commenced at one o'clock in the afternoon. I dug up the paving, and was digging the ditch to repair a leak in the service water pipe that ran around across the street to William Kreim's property. The pipe had burst and rotted out. It had to be repaired, and I dug down to it, and made the repairs. After Tripman went home, at about half-past five, I remained there at work, and completed the work before I went home. After I had got done with it, I hung out a lantern that evening. The pavement has only one layer of brick on top of the sand, and a sub-foundation. The brick had been put on top of the sidewalk. I was not right there at the time of the accident. I had just stepped

across the sidewalk into Janssen & Struve's yard, which is on the east side of the street, and south of and adjoining the Janssen & Struve building. It was about twenty-five or thirty feet from where this ditch was, where I stepped into the yard. I went to get to a water-closet, because of a call of nature. I was gone not over three minutes. I went right back to the ditch, and when I got back to the ditch, the accident had happened. Before I went into the yard, I did not see any person or vehicle passing, or any teams standing about there, except a load of hay in front of Mall-man's grocery. I did not see Mr. Jackson and this lady coming up the street. When I got back to the trench the parties had not got back into the buggy. I saw them get back in." There was no evidence which can be said to be in conflict with the testimony of this witness, except that one or more witnesses testified that they thought the work was continued in the street for two days. But we think the jury should have found that there was no real danger after the earth was put back in the trench on the evening of the accident. The signal light was, doubtless, placed in the street because the brick paving had not been replaced.

It appears that the plumbers made the excavation without any permit from the city authorities; and the proper officers of the city had no actual knowledge of the excavation. A motion was made at the close of the introduction of plaintiff's evidence that the court direct the jury to return a verdict for the defendant. The motion was overruled. We think it should have been sustained. There being no actual notice to the city, and there being no such lapse of time as that the city could properly be charged with constructive notice, there was no right of recovery. It will be understood that such excavations in streets are at times necessary. If the work is done in a proper manner, and signal lights are put in proper position,

or guards, or barriers, are erected when the work is left by the laborers at night, no one is chargeable with negligence. While the workmen are present and engaged in the work during the day, no such protection is necessary. It would be carrying the doctrine of constructive notice to an unwarranted extent to hold that a jury might find the city negligent because, before the close of the day, the laborer absented himself from the work for a few minutes, for a necessary purpose.

Other questions are discussed by counsel for appellant, which we do not consider. Counsel for appellee have not made an appearance in this court, and we think, in view of the evidence in the case, that the failure to file an argument ought to be regarded as an admission that the judgment of the district court cannot be sustained. For the error in overruling the motion for a directed verdict, the judgment is REVERSED.

GEORGE A. LAIRD v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

100	336
115	87
100	336
123	355
100	336
125	53
100	336
131	49
100	336
144	292
144	340

Total Disability: PLEADING: Damages. An instruction, in an action by a railroad engineer for personal injuries, which fails to specifically instruct the jury, that in arriving at the damages to his earning power, they must consider what he may be able to earn in the future by intellectual as well as manual labor, is erroneous even though the complaint alleges a loss of earning power by manual labor, only. The defendant railroad should not have to pay for the results of total disability of plaintiff, if, though incapacitated for manual labor, he remained able to earn money otherwise.

Constitutional Questions: EVIDENCE: General and special rules of

Appeal from Guthrie District Court.—HON. J. H. APPLE-
GATE, Judge.

FRIDAY, DECEMBER 11, 1896.

ACTION for personal injuries. Verdict and judgment for plaintiff, and the defendant appealed.—*Reversed.*

Cummins & Wright, Neal & Neal, and Robert Mather for appellant.

Carr & Parker and F. O. Hinkson for appellee.

GRANGER, J.—About the seventeenth of February, 1894, the plaintiff was in the employ of the defendant company as a locomotive engineer. On that day, the engine on which he was engaged, collided with another engine on defendant's line, and plaintiff was injured, and the action is for damages sustained thereby. On

the measure of damages, the court gave the following instruction, of which complaint is made:

1 "If you find from the evidence, and under these instructions, that plaintiff is entitled to recover, then you should allow him as damages such sum or amount as will fairly and reasonably compensate him for the loss he has sustained, as such damages and amount thereof are shown by the evidence. If you find he is entitled to recover, the elements of his damages will consist of his loss of time occasioned by the disability, if any, in the matter of pursuing his usual business, or performing other manual labor, and the physical pain and suffering and mental anguish, if any, occasioned by reason of his injuries. You should allow him, on account of his disability to perform manual labor, only such sum as will fairly and reasonably compensate him for the loss he is shown by the evidence to

have thus sustained. In determining the pecuniary injury he has sustained in this particular by reason of the injuries complained of, you should take into consideration the situation and physical condition he was in prior to and at the time he received the injuries complained of; his age, condition of health, habits as to industry, character and employment; the wages he was earning prior to and at the time of the injuries; the nature and extent of the injuries he has sustained; to what extent he is unable to perform labor by reason of said injuries; whether said injuries are permanent, or otherwise; if only temporary, the probable duration thereof; if permanent, the probable duration of his life,—together with all the other facts and circumstances bearing upon said question, as the same have been shown and developed upon the trial hereof, and therefrom determine and allow such reasonable sum or amount as you find, under the evidence will compensate him for the loss he

2 has thus sustained. In estimating this element of damages, you should bear in mind that you should allow him only such sum as will compensate him for his loss in being disabled from pursuing his usual business or performing other manual labor, in his being thus deprived of the earnings of his business as locomotive engineer or other manual labor. You should also take into consideration the fact that, in his business of locomotive engineer, his earnings were paid as same were earned; and, in fixing the amount of his damages, based upon what he would have been able to have earned in the future but for the injuries complained of, you should take into consideration the present value of such earnings." The complaint as to the instruction is that it does not permit the jury, in estimating the damage, to consider the capacity of the plaintiff to earn money otherwise than by manual labor; that is, as we understand counsel for appellant,

if plaintiff is, because of the injury, totally disabled from performing manual labor, including his work as an engineer, but is able to earn money otherwise than by manual labor, that fact could not be considered to lessen the damage, but that, in fixing the plaintiff's ability to earn money, only his ability to do so by manual labor is to be considered. A careful reading and re-reading of the instruction leads to the conclusion that its purpose was to limit a recovery, other than for physical suffering, loss of time, and mental anguish, to damages resulting from an inability to do manual labor, including the work of an engineer, which the instruction recognizes as manual labor. We think the effect claimed for the instruction is correct.

Appellee, in argument, says: "The alleged disability resulting from the injury is loss of ability to pursue his usual occupation or to perform any manual labor." Looking to the averments of the petition, we find them in accord with the argument, and there can

be no doubt of the theory on which the case
3 was submitted. Does the fact that plaintiff has

limited his right of recovery to damages for a particular injury change the rule as to what facts can be considered to lessen the damage? It would hardly be claimed, if plaintiff's disability to earn money by manual labor is total, but he could, by some other labor, earn one-half as much, that he would be entitled to the full measure of damages for his total disability; but the rule will be conceded that he may recover the damage resulting from his loss of ability or capacity to earn money. We do not find a case in which the rule is expressed as in the instruction under consideration. A difficulty we experienced is that the instruction is silent as to the effect of an ability to earn money other than by manual labor. It does not, in terms, authorize the jury to consider that fact, nor

prohibit them from so doing. That it is a fact that should be considered we have no doubt; nor do we think that others have. In *Comaskey v. Railway Co.* (N. Dak.) 55 N. W. Rep. 732, it is held that where, in a suit for personal injuries, no claim is made for impairment to mental powers, it was error to permit such fact to be taken into account by the jury in estimating damages. The case is cited by appellee, but it does not reach the question in this case. Its effect is to hold that a plaintiff, seeking damages for personal injuries, is limited, as to the elements of recovery, by his averments. Appellee says the instruction given does not prohibit the jury from considering the capacity generally to earn money. It does not in terms, as we have said, nor does it authorize it, unless by implication. The instruction does particularize as to the matters to be considered, and we think in a way that the jury would not understand, or in any way have in mind, the question of the ability of plaintiff to earn money except by manual labor. The plaintiff was a witness before the jury, and the evidence was such that the jury could properly consider the question of earning money in other ways. The verdict is thought to be erroneously excessive, being for twelve thousand dollars, and this question seems to be an important one in the case. The meaning of the instruction is certainly in doubt, and, we think, to the prejudice of the defendant.

II. A point strongly urged by appellant is the contributory negligence of plaintiff. The injury happened in the yard limits between Des Moines and Valley Junction, a distance of five miles. There were special rules of the company, known to the plaintiff, for the operation of trains and engines within
4 such yard limits, and these rules were put in evidence for the defendant. There was evidence tending to show that, at the time of the accident,

plaintiff was violating such rules, because of which contributory negligence is claimed. On rebuttal, against objections, plaintiff was permitted to introduce a rule of the company, as follows: "Freight and work trains will not run to exceed twenty-five miles an hour, unless ordered by the superintendent." Complaint is made of the ruling. The object of the rule as evidence must have been to show that plaintiff was not, at the time of the accident, exceeding the rate of speed allowed. The record shows, without dispute, that the speed of trains, within the yard limits, is governed by rules especially applicable thereto, and that general rules do not apply. The rule objected to is a part of what appears as "Exhibit B" in the record, and it appears that it does not apply to the operation of trains between Altoona and Valley Junction, on which part of the line the accident occurred. As we view the record, the rule in question had nothing to do with plaintiff's duties when the engines collided. He was then to be governed by rules applicable to the yard limits, known in the record as "Exhibit A."

The question of contributory negligence is important in the case, and whether or not plaintiff was violating his instructions as to the speed of his train when he was injured was a question of importance in finding the fact of such negligence. The rule in question might well have been decisive of it, for it permitted a rate of speed greater than is claimed by appellant. The admission of the rule in evidence was error.

We see no other questions important to be considered in view of a new trial.—REVERSED.

STATE OF IOWA, Appellant, v. WILLIAM JAMISON.

Change of Venue: JUSTICE AND MAYOR: *Appeal to district court* Code, section 508, provides, that the mayor of a city or town shall have the jurisdiction of a justice of the peace, "and the rules of law regulating proceedings before a justice shall be applicable to proceedings before such mayor." Section 4671 provides, that on application for a change of venue, a justice of the peace shall transmit the papers in the case, etc., to the next nearest justice in the township, and that, in case the next nearest justice is disqualified, the venue shall be changed to the next nearest qualified justice in the county. *Held*, that, where a change of venue is granted by a justice, it is error to send the case to a mayor who is nearer than the next nearest justice; and the jurisdiction of the mayor may be reviewed on appeal to the district court, from a conviction in mayor's court.

Appeal from Butler District Court.—HON. JOHN C. SHERWIN, Judge.

SATURDAY, DECEMBER 12, 1896.

THE defendant was accused of the crime of assault and battery. He was tried before the mayor of the town of Allison, and was convicted. He appealed to the district court, where the appeal was dismissed, and the defendant was discharged. The state appeals.—*Affirmed*.

J. W. Arbuckle, county attorney, and J. H. Scales for the state.

C. M. Greene for appellee.

ROTHROCK, C. J.—The defendant was arrested upon a warrant issued by a justice of the peace. He made an application for a change of venue, which was granted, and the justice made an order transferring the case to the mayor of the town of Allison, he being

nearer than any other justice of the peace in the township. The defendant objected to the order, and demanded that the case be sent to the next nearest justice of the peace. When the transcript was filed before the mayor, the defendant demurred to the jurisdiction of that officer or court. The demurrer was overruled, and the defendant excepted. A trial was had, and the defendant was found guilty, and sentenced to imprisonment in the county jail for ten days. An appeal was taken to the district court, where, on the motion of the defendant, the prosecution was dismissed, and the defendant was discharged, because the mayor did not have jurisdiction to try the case. The question to be determined is, should the justice have transferred the case to the next nearest justice of the peace? It is provided by section 4671 of the Code that when a proper application has been filed in a case commenced before a justice of the peace, "the justice must immediately transmit all the original papers, and a transcript of all of his docket entries in the case, to the next nearest justice in the township," and said section further provides that, in case the next nearest justice is disqualified from acting in the trial of the case, the venue shall be changed "to the next nearest justice in the county" against whom no disqualifying objection exists. By section 506 of the Code it is enacted that the mayor of a city or incorporated town shall have the jurisdiction of a justice of the peace, "and the rules of law regulating proceedings before a justice shall be applicable to proceedings before such mayor." This last section of the statute makes no specific provision for a change of venue from a mayor to a justice of the peace. In *Finch v. Marvin*, 46 Iowa, 384, this court held that, as the law provides that the rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before a mayor, a change of

venue from a mayor to a justice of the peace might be had. But it was not determined in that case, nor in any case cited in argument by counsel, that a change of venue may be had from a justice of the peace to the mayor of a city or town. Section 4671 of the Code, above quoted, provides just what a justice of the peace shall do in the matter of making such an order. He is required to send the case to the next nearest justice in the township, and may, upon the contingency provided in the statute, transfer it to another justice in the county. No provision is made for sending it to the next nearest mayor of a city or town. The word "justice" is not a general term, applicable alike to all courts having jurisdiction of minor offenses. It is used throughout the statute as applicable to justices of the peace, and not to mayors or judges of police courts or other officers. We think the court correctly held that the order changing the venue to the mayor of Allison was error, and that the mayor acquired no jurisdiction to try the defendant for the alleged offense. It is to be remembered that this case does not involve the rights of a defendant who, by his acts, consents to a change to a justice of the peace who is in fact not the next nearest to the justice before whom the case was commenced. The defendant herein objected and protested against being taken before the mayor, at every opportunity he had up to the final dismissal in the district court.

It is contended that an appeal from the mayor was not the proper remedy. We think that, as this is

WILLIAM GREGORY, Appellant, v. THE CHICAGO &
NORTHWESTERN RAILWAY COMPANY.

Ejection of Passenger. Where a passenger takes a dog with him
1 into a passenger car, contrary to the rules of the railroad com-
pany, and refuses to remove him when requested, the conductor is
8 justified in removing both from the car in a proper manner, though
the passenger has paid his fare.

REASONABLE: Court and jury. The reasonableness of a rule of a
railway company prohibiting a passenger from having a dog
2 with him in its passenger coach, and exacting a charge for carry-
ing dogs in the baggage car, is a question of law for the court;
and its holding that such rules are reasonable, is affirmed.

RECOVERY OF TICKET. A passenger who is removed from a railway
train on account of his refusal to comply with a reasonable regu-
4 lation of the company, forfeits his rights under his ticket, and
cannot recover the value thereof.

Appeal from Crawford District Court.—HON. Z. A.
CHURCH, Judge.

SATURDAY, DECEMBER 12, 1896.

ACTION at law, to recover damages for being
ejected from one of defendant's passenger trains. At
the conclusion of the evidence on behalf of plaintiff,
the court sustained defendant's motion for a verdict,
and rendered judgment for the defendant. Plaintiff
appeals.—*Affirmed.*

J. P. Conner for appellant.

T. J. Garrison and Hubbard & Dawley for appellee.

GIVEN, J.—I. The grounds of defendant's motion
for a verdict were, that the evidence shows that the
plaintiff was ejected from the train lawfully, and
without unnecessary violence, insult, or injury; that

the requirement that he remove his dog was reasonable, and one which the conductor had a right to enforce by removing the plaintiff; and that there is not sufficient evidence to sustain a verdict for the plaintiff. The errors assigned are, that the court erred in sustaining this motion on each and every ground thereof, and in not submitting the case to the jury.

But two witnesses were examined, namely, the plaintiff and H. Williams, and the facts testified to are, in substance, as follows: In September, 1893, the plaintiff, in response to a telegram from his wife to come to their home, near Kimball, S. D., got on board one of defendant's passenger trains at Sutherland, Iowa, for Hawarden. Plaintiff did not have time to buy a ticket, and consequently paid his fare to the first station, where, by the direction of the conductor, he purchased a ticket for one dollar and forty-five cents to Hawarden, which ticket he surrendered
1 to the conductor. When he boarded the train he had with him a bird dog, led by a cord, which he took with him into the smoking car, and placed between the seats where he sat. After plaintiff had given up his ticket, the brakeman, observing the dog, said to the plaintiff: "Why don't you put the dog in the baggage car? If you want to ride with a dog it is no reason other people should." After that, plaintiff asked the conductor, as he was passing, if his dog could ride in there, and was told: "We have been forbidden to let people put their dogs in the coach. They have to be put in the baggage car," and told plaintiff to put him there at Alton. At Alton plaintiff took his dog to the baggage car, and was told by the baggage man that he must pay fifty cents to put the dog in the car. Thus far we have the testimony of the plaintiff alone, and as to what followed, we have also the testimony of Mr. Williams, who was at the

baggage car. Plaintiff says the baggage man told him it would cost fifty cents. That he (plaintiff) told the baggage man that he thought he had only money enough to get home, and that he replied: "I can't help it. I can't carry him then;" and that plaintiff went back to his seat in the smoking car, taking the dog with him. He further testified as follows: "In a few minutes the conductor and brakeman both came in. The conductor said: 'I thought you were going to put your dog in the baggage car.' I said I was but they would not take him without my paying fifty cents, and I did not have money enough only to pay my way home to Brule county. He said: 'Well, you had better dig up, or you will have to get off. You can't take your dog on this train.' I told him to give me my ticket back, and he said he would not do it, or could not do it, I do not know which; but anyhow he took hold of me, and said: 'Dig up, or get off here,' and took hold of my arm, and said: 'Come along.' I was sitting on the left-hand side of the car, and I took hold of the seat, and held, and he pulled on me, and I held to the seat, and he was a small fellow, and he didn't get me loose. Then the brakeman attempted as though he was going to take hold of me too. The conductor seemed to get mad or excited or something, and said: 'I will show you, if you don't get off,' and went out the door, and in a few minutes he came in with the city marshal, who walked up to me, and said: 'I guess, old man, you will have to come here,' and took hold of me. The man had a star on his coat. When I saw the star, I told the man I had a first-class ticket to ride on the train. The conductor said: 'Well, hurry up, and take him off.' He got hold on the other side, and the marshal says: 'I am an officer,' and reached his hand behind him, as though he was going to draw a weapon or something, and I said: 'I guess you have the

authority to arrest me, and take me off, and I will go.' I got on the platform, and the marshal stood by me, and the conductor waved the engineer to pull out, and the marshal would not let me get on." Mr. Williams, who had come to the train to receive some express goods, testified to substantially the same occurrence at the baggage car, except that the baggage man said it would cost twenty-five cents to carry the dog. He testified as follows as to what occurred after the plaintiff was told he could not put his dog in the baggage car without paying: "Mr. Gregory turned, and walked away, and as he walked away said he had a first-class ticket, and was going to take his dog with him in the coach, and he went and got into the coach, and took the dog with him. The brakeman and conductor then went into the coach. I stepped on the platform of the coach, and heard the conductor talking with Mr. Gregory. He told Mr. Gregory he would have to put the dog in the baggage car. Mr. Gregory said he had been to the baggage car with the dog, and the baggage man wouldn't take him until he gave him twenty-five cents. Mr. Gregory said he did not have twenty-five cents; that if he did have it he would give it, and put the dog in the baggage car. The conductor then said, "Your dog can't ride in this coach, and you will have to take him off." Gregory said he had a first-class ticket, and he was not going to leave his dog. They had more or less talk that I can't remember, but the conductor said: 'You'll have to get off. Your dog can't ride in this coach.' Then Gregory told him that he and his crew could not put him off, and the conductor said, 'I will show you that you can be put off,' or 'taken off the train,' and stepped off the coach, and called the marshal of the town. The marshal came, and told Mr. Gregory he would have to get off the train with the dog. Mr. Gregory said to the marshal, 'I suppose you

have the right to take me off,' and he got up, and took his dog, and walked out of the coach with the marshal."

II. Appellant's first contention is "that it was not for the court to decide whether it was a reasonable or proper regulation which prohibited the dog's riding in the smoking car with the plaintiff, but a question of fact for the jury to decide."

Appellant refers to no authority, and the only case we find that seems to hold the rule contended for is *State v. Overton*, 24 N. J. Law, 435. An examination of that case will show that it is not authority for the rule. The question is discussed at length, a distinction made between by-laws and regulations affecting third persons, and a seeming holding that the reasonableness of the former should be determined by the court, and of the latter by the jury. The court says, however: "Here was no evidence of any by-law, or of any regulation made by the company affecting the rights of passengers upon the reasonableness or validity of which either court or jury was called upon to decide. The right of the passenger rested upon his contract." Again, the court says, "But there was, in reality, no such question involved in the present case." In that case the defendant, a conductor, was prosecuted criminally for ejecting a man from the train who had purchased a ticket from one point to another, and had stopped at an intermediate station without a stop-over check, and sought to ride on the defendant's train on the train check of the first conductor. In *State v. Chovin*, 7 Iowa, 204, the defendant, a conductor, was prosecuted for ejecting a man who refused to pay ten cents more than the price of a ticket, exacted from passengers who did not procure tickets. After recognizing the right of the company to make reasonable regulations for the safety and security of its passengers to facilitate its business, and for the conduct

of passengers while on its trains, the court says: "In *State v. Overton*, 24 N. J. Law, 435, it was held that the reasonableness of the regulations was a question of fact for the jury; and to this we may add that all regulations will be deemed reasonable which are suitable to enable the company to perform the duties it undertakes, and to secure its own just rights in such employment; and also such as are necessary and proper to insure the safety and promote the comfort of passengers,"—referring to *Commonwealth v. Power*, 7 Metcalf (Mass.) 596. This might seem decisive of the question, but, referring to that case, it will be seen that it was tried to the court without the intervention of a jury; therefore this question could not arise, and what is said is not decisive of the question, but merely incidental to the matters being considered. The question is not referred to in the *Power Case*. Justice Stockton, dissenting, says: "Whether the reasonableness of any given law, rule, or regulation is to be determined by the court, or is a question of fact for a jury, has not been settled by any preponderance of authority." In *Railroad Co. v. Fleming*, 14 Lea. 145, it is said: "The rules and regulations of a railroad corporation, as of other corporations, are subject to the requirements that they must be reasonable. Whether they are reasonable or not, is a question for the court, and not for the jury, and this is for the obvious reason, that there must be uniformity in the construction, which can always be obtained by the decision of the court. If left as a question of fact to the jury, the result might vary with each jury, and the corporation could have no certainty that any rule would stand the test with every jury. Ordinarily, too, jurors are not aware, and cannot readily be made aware, of all the reasons calling for the rule,"—referring to *Vedder v. Fellows*, 20 N. Y. 126, which fully sustains the conclusion. See, also *Avery v. Railroad Co.*, 121 N. Y., at page 44 (24 N. E.

Rep. 23). In *Railroad Co. v. Wittemore*, 43 Ill. 420, the lower court left it to the jury to say whether a rule requiring passengers to surrender their tickets was reasonable, and the supreme court said: "This was error. It was proper to admit testimony, as was done, but, either with or without this testimony, it was for the court to say whether the regulation was reasonable, and, therefore, obligatory upon the passengers. The necessity of holding this to be a question of law, and, therefore, within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent relation can be established. If this question is to be left to juries, one rule would be applied by them to-day and another to-morrow. In one trial a railway would be liable, and in another, presenting the same question, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the roads and to the public." In *Chilton v. Railroad Co.*, 114 Mo. 89 (21 S. W. Rep. 458), one contention was whether a regulation which excluded colored women from the ladies' coach was reasonable. The court says: "Whether this regulation, the facts being undisputed, was a reasonable one, was a question of law, to be determined by the court; and in submitting it as a question of fact to the jury, the court committed error." In *Railroad Co. v. Wysor*, 82 Va. 250, it is said, at page 261: "The reasonableness of the rules and regulations of a railroad company is a question of law addressed to the courts." See, also, *Commonwealth v. Worcester*, 3 Pick. 462, and *Vandine Case*, 6 Pick. 187. We are of the opinion that reason and the weight of authorities are in favor of the rule that the reasonableness of regulations prescribed by railroad corporations for the safety, comfort, and

conduct of its passengers, and for the proper management of its business, are questions for the courts to decide. We think the court properly held that the regulations prohibiting persons from taking dogs with them to be carried on cars used for the carriage of passengers, and the rule requiring pay for carrying them in baggage cars, are reasonable, and were properly held to be such by the trial court.

III. Appellant's further contention is that the most that could be claimed would be that the conductor could have the dog removed from the car, but not the plaintiff. If plaintiff had removed his dog
3 from the car, unquestionably he had a right to remain thereon. This he did not do, nor offer to do. It is evident that when he failed to get his dog carried in the baggage car, he determined to keep him with him in the smoking car. As he walked away from the baggage car, he said "he had a first-class ticket, and was going to take his dog with him in the coach," and did so. He was told, "Your dog can't ride in this coach, and you will have to take him off." To this he replied that "he had a first-class ticket, and he was not going to leave his dog." It is evident that the plaintiff not only refused to remove the dog, as it was his duty to do, but insisted on keeping him in the car. The rule that prohibited this is reasonable, and, as the plaintiff refused to remove the dog, the conductor was justified in removing both from the car, and did so in a proper manner.

It is argued that plaintiff is entitled to recover the value of his ticket from Alton to Hawarden; but not so, as he had forfeited his right to ride on
4 the train by refusing to comply with a reasonable regulation. Under the evidence, there was no question to be submitted to the jury, and no evidence to support a verdict for the plaintiff.—**AFFIRMED.**

ARGO, McDUFFIE & ARGO v. J. A. BLONDEL, Appellant.

Contract: ADMINISTRATOR: *Personal liability.* A written agreement reciting that a firm of attorneys, had been advising the heirs of an estate, and had procured the appointment of a named person as a co-administrator thereof, and that such co-administrator as such promises to pay a certain sum for such services and to reimburse them for moneys expended, in consideration for which they are to release him and his co-administrator from all claims on account thereof, is, when signed by the co-administrator, *individually*, his individual contract, on which he may be sued individually, whether the services were to the estate or not.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

SATURDAY, DECEMBER 12, 1896.

ACTION to recover upon a contract in writing. Defendant demurred to the petition, which demurrer was overruled; and, defendant electing to stand thereon, judgment was rendered against him, from which he appeals.—*Affirmed.*

Lohr, Gardiner & Lohr for appellant.

Argo, McDuffie & Argo in pro. per.

GIVEN, J.—The contract sued upon is as follows: "This contract, made and entered into by and between J. A. Blondel, party of the first part, and Argo, McDuffie & Argo, parties of the second part, witnesseth: That whereas, the parties of the second part have performed legal services in the matter of the estate of John B. Arteaux, deceased, in advising with the heirs of said decedent, and in assisting said J. A. Blondel in procuring the appointment as co-administrator of said estate, it is hereby agreed and understood that said J.

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A. Blondel, as such co-administrator, shall pay the said parties of the second part, for their said services, the sum of one hundred and twenty-five dollars, and reimburse them for the actual expenses they have laid out in the matter up to this date, in the proximate sum of twenty-five dollars; and, in consideration of the amount, the parties of the second part, hereby agree to release the party of the first part and the other administrator of the estate, from all fees or claims for services which they have rendered in relation to said appointment in Iowa up to this time, and which may hereafter be rendered in Iowa in relation to said appointment. J. A. Blondel, Party of the First Part. Argo, McDuffie & Argo, Parties of the Second Part." The grounds of the demurrer are: (1) The contract set out in plaintiff's petition shows that the defendant, J. A. Blondel, executed the same as co-administrator of the estate of John B. Arteaux, deceased, solely to bind said estate; (2) that said contract does not show any personal liability on the part of the defendant, J. A. Blondel. The contention is, whether appellant is individually liable on this contract.

The contract is entered into and signed by him, not as administrator, but in his individual capacity. The services to be paid for, though in the matter of the estate, seem to have been regarded as not properly chargeable to the estate. They were to the heirs in advising with them, and to appellant in procuring the appointment as co-administrator. True, the contract recites "that said J. A. Blondel, as such co-administrator, shall pay," but following this it is provided that, "in consideration of the amount, the parties of the second part hereby agree to release the party of

the parties that the services rendered in relation to the appointment might be chargeable to the estate. We think this contract shows quite plainly that appellant agreed as an individual to assume and pay for these services in the amount named, regardless of whether they were to the estate or not. The judgment of the district court is **AFFIRMED**.

W. G. PRESS & COMPANY, Appellants, v. J. R. DUNCAN.

Gaming Contract: EVIDENCE OF INTENT: *Conflicting evidence on appeal.* The question whether a contract for the purchase of grain through a broker, contemplated an actual delivery of the grain, or merely a purchase on margins, and was therefore invalid, is to be determined, not only from the contract, but also from the conduct of the parties themselves, and where the evidence as to intent conflicts, this court will not interfere with the finding.

Appeal from Louisa District Court.—HON. D. RYAN,
Judge.

SATURDAY, DECEMBER 12, 1896.

PLAINTIFF'S suit is brought on a promissary note for five hundred dollars, drawing six per cent. interest, and dated March 3, 1893. It is due January 1, 1894. Defendant claims that the note sued on was given for money due plaintiffs, for margins advanced by them for defendant on option deals; that it was the intention of all the parties to said transaction, that no grain should be delivered, and no further purchase price paid, but said contracts should be settled by the payment of the difference between the contract price of the grain purchased and the market price of the same at the time fixed in the contract. They therefore claim that the note sued on is without consideration. The cause was, by agreement of parties, tried to the court, and at the conclusion of the

trial a judgment was entered against the plaintiffs for costs, and they appeal.—*Affirmed.*

Gray & Tucker for appellants.

C. A. Carpenter for appellee.

KINNE, J.—I. The contention of the defendant in this case is, that the consideration of the note in suit was margins put up by plaintiffs for the defendant, in option deals on the Board of Trade of the City of Chicago, in transactions in which no grain or produce was ever received or delivered, and that it was the intention of both plaintiffs and defendant, that no grain or produce so pretended to be purchased, should be received or delivered, but that the differences arising upon said deals should be paid in money. Counsel for appellants concede that, "where the parties intend that the contract shall be settled by the payment of differences between the contract price and the market price at a time fixed, the contract is void." Optional contracts, in such cases, are void, when they do not contemplate the actual delivery of the commodity purchased, but rather contemplate that the subject of the contract is not intended to be delivered. *Gregory v. Wattowa*, 58 Iowa, 713 (12 N. W. Rep. 726); *Murray v. Ocheltree*, 59 Iowa, 436 (13 N. W. Rep. 411); *First Nat. Bank of Lyons v. Oskaloosa Packing Co.*, 66 Iowa, 41 (23 N. W. Rep. 255); *Tomblin v. Callen*, 69 Iowa, 229 (28 N. W. Rep. 573); *Osgood v. Bauder*, 75 Iowa, 557 (39 N. W. Rep. 887). There being no dispute as to the law applicable to this case, we need not cite authorities from other courts. The cases above cited also hold that the intention of both parties to the contract must be determined, not only from the contract itself, but as well from the acts and conduct of the parties under it. The plaintiffs all testify that

these deals, which defendant insists were mere option contracts, in fact contemplated an actual delivery of the grain and produce dealt in, and that the reason there was no delivery was, because the contracts were closed out by order of the defendant before they matured. If they are to be believed, then the contracts were legal, and the note is based upon a valid consideration. On the other hand, the defendant's evidence shows, that he had no intention or expectation that the commodity purchased should ever be delivered, and there are facts and circumstances appearing in the evidence, which need not be recited, which tend strongly to show that the intention of the plaintiff was the same as that of the defendant. Under such a conflict in the evidence, we are not warranted in disturbing the finding and judgment of the court below, which has the force and effect of a verdict of a jury.—AFFIRMED.

**M. V. YOUNG v. THE CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, Appellant.**

100 357
114 376

Boarding Moving Train: VIOLATION OF STATE LAW: *Rules of railroad.* Under the statutes of Illinois (Hurd's Revised Statutes 1891, chapter 114, section 79), forbidding any person to board a moving train, except in compliance with law, or by permission, 1 under the lawful rules and regulations of the company, a person injured while attempting to board a moving train within the state of Illinois, cannot recover therefor, in Iowa, unless it appears that he was acting in compliance with law, or by permission, under the lawful rules of the company.

BURDEN OF PROOF. Where such attempt was made by permission, or direction, of the conductor of the train, the burden is on the

Appeal from Guthrie District Court.—HON. J. H. APPLE-
GATE, Judge.

SATURDAY, DECEMBER 12, 1896.

THIS is an action for damages which plaintiff claimed to have sustained because of injuries received while attempting to board a moving train of the defendant company at Kirkland, Ill. Plaintiff was a resident of Yale, Iowa, and was shipping four cars of live stock from his home to Chicago, Ill. He was accompanying said stock, and was riding on a shipper's pass. As the train slowed up at Kirkland, plaintiff claims the conductor advised him that they would have fifteen minutes at Kirkland for lunch, and also stated that there was a lunch counter there. Plaintiff claims he got out of the caboose, and, with others, entered the lunch room, and shortly thereafter the train was seen to move, whereupon some one asked the conductor if the train was going, and he replied, "Yes; better get on; the train was going," or "Get on the train, if you don't want to get left," or something to that effect. Whereupon plaintiff hastened from the lunch room, and ran to the rear of the train, which, he testifies, was going at from three to four miles an hour, and attempted to climb on the rear platform of the caboose. In making the attempt, and while having hold of a car, a jerk, as he claims, of the train, loosened his hold, and he fell on the rails, breaking and otherwise injuring his teeth, and inflicting other injuries. The defendant pleaded a general denial, and that the accident was caused by plaintiff's negligence; also, a statute of the state of Illinois prohibiting passengers from mounting moving trains. A trial was had to a jury, which returned a verdict for plaintiff in the sum of one hundred and twenty-five dollars.

Judgment was entered upon the verdict, from which defendant appeals.—*Reversed.*

E. W. Weeks and *Wright & Baldwin* for appellant.

S. D. Nichols for appellee.

KINNE, J.—I. Our conclusion in this case requires the consideration of but one question, which we deem decisive of plaintiff's rights. The defendant pleaded a statute of the state of Illinois, which provides:

1 "No person or minor shall climb, jump, step, stand upon, cling to or in any way attach himself to any locomotive engine or car, either stationary or in motion, upon any part of the track of any railroad, unless in so doing he shall be acting in compliance with law, or by permission, under the lawful rules and regulations of the corporations then owning and managing such railroads." Hurd's Rev. St. 1891, chapter 114, section 79. Another section provides for the imposition of a fine for a violation of the act. Id. section 81. Plaintiff cannot recover in this action if his own negligence contributed to produce the injuries of which he complains. If such injuries were received as the direct result of a violation of the statute of the state of Illinois, then it must be held that his act in attempting to mount the moving train was, as a matter of law, negligence, which precludes his recovery. One may not be guilty of contributory negligence who receives an injury while he is engaged in an act in violation of law. *Gross v. Miller*, 95 Iowa, 72 (61 N. W. Rep. 385); *Schmid v. Humphrey*, 48 Iowa, 652; *Van Horn v. Railway Co.*, 63 Iowa, 68 (18 N. W. Rep. 679). The test is, was the unlawful act the proximate cause of the accident, or injury? If so, he cannot recover. Beach, Contrib. Neg. sections 45-47; 4 Am. & Eng. Enc. Law, p. 50; *Gross v. Miller*, 93 Iowa, 72

(61 N. W. Rep. 385). In other words, if there was such a relation or connection between the accident and the act of violating the statute of the state of Illinois, on part of the plaintiff, as to cause, or help to cause, the accident, then he was guilty of contributory negligence, as a matter of law. *Gross v. Miller*, 93 Iowa, 72 (61 N. W. Rep. 385); *Van Horn v. Railway Co.*, 63 Iowa, 68 (18 N. W. Rep. 679); *Schmid v. Humphrey*, 48 Iowa, 652; *Gribble v. City of Sioux City*, 38 Iowa, 390. It is said in *Herman v. Railway Co.*, 79 Iowa, 162 (44 N. W. Rep. 229), in speaking of an instruction: "This instruction is conceded to be correct, because, by section 2, chapter 148, Laws Sixteenth General Assembly, it would have been a misdemeanor for plaintiff to jump from the train while it was in motion, and, under such a state of facts, the law would conclusively presume that the injury was the result of his own negligence." The statute in this state relating to getting on and off moving trains is, in substance, like that of Illinois, above quoted. In *Raben v. Railway Co.*, 74 Iowa, 732 (34 N. W. Rep. 621), it was, in effect, held that, under the statute of this state, if the act of an injured party in getting off of a train was a misdemeanor, she could not recover. The same rule is recognized in *Galloway v. Railway Co.*, 87 Iowa, 466 (54 N. W. Rep. 447). The failure to comply with a duty imposed by statute, or ordinance, is usually held to be negligence, as a matter of law. *Smith v. Trader's Exchange* (Wis.) (64 N. W. Rep. 1041). This might be otherwise if the act of the one who inflicted the wrong was wantonly or wilfully done. Unless, then, plaintiff has shown that, in attempting to mount the moving train, he was "acting in compliance with law, or by permission, under the lawful rules and regulations of the" defendant company, his act will prevent his recovery.

II. The claim of plaintiff is that he had the "permission of the conductor of the train, or, being directed by him (which amounts to the same thing), had a right to infer that he was acting in compliance with the rules and regulations of the defendant company." There is nothing in the record to show what the "lawful rules and regulations" of the defendant were. It cannot be assumed that they were such as to authorize trainmen to advise passengers to violate the law of the state, especially when such violation was likely to be followed by an injury to the passenger. Nor do we agree with counsel for the plaintiff that it was incumbent upon the defendant to plead and prove these rules and regulations. Plaintiff was *prima facie* acting in violation of the law in attempting to board the moving cars. If he was, in so doing, acting in compliance with law, or by permission, under the lawful rules and regulations of the defendant, it was incumbent upon him to establish that fact. He has not done so, and, it seems to us, is in no position to recover, until he, by proper proof, brings himself within the provisions of the statute which excuse his act in attempting to mount the moving cars. This court said, in the *Raben Case*: "The burden was on plaintiff to prove that the circumstances of the occurrence were such that she was entitled to recover for the injury she sustained, and the question of her right to recover depends upon whether her own act was lawful. It follows, necessarily, that she is not entitled to recover without proof that she was acting lawfully at the time." Our conclusion renders it unnecessary that we consider other questions argued.—REVERSED.

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109	238

100	362
119	271

L. McKINNEY, *et al.*, Appellants, v. PETER BAKER, *et al.*

Certiorari: VACATION OF HIGHWAY: Notice. Where it is sought to review, by *certiorari*, proceedings had to vacate a highway, on the
1 ground that no notice was served on the owner (plaintiff), or on occupants of the land abutting the highway, the petition will be demurrable unless it avers that plaintiff's ownership appeared on the auditor's transfer book, or that he resided within the county, or that said occupants so resided.

IRREGULARITIES. Proceedings of the board of supervisors, vacating a highway, are not void because the appraisers were not appointed
2 on the day set for filing claims, but on another day, as no damages are allowable for vacating a highway, and it is therefore immaterial when the appraisers are appointed.

Appeal from Keokuk District Court.—HON. D. RYAN,
Judge.

SATURDAY, DECEMBER 12, 1896.

THIS is a proceeding by *certiorari*. Plaintiffs, in their petition filed in the district court, averred that the defendants, the board of supervisors and auditor of the county of Keokuk, had exceeded their jurisdiction, in that they failed to put the names of the owners of the land through which the highway passed, in the published notice of the filing of the petition to vacate the road in controversy. Also, because the defendants did not serve any notice upon the owners of the land through which the road runs; that they failed to appoint commissioners on the proper day; that they proceeded to hear and determine the

road, thereby depriving the owners of certain tracts of land from an outlet to a public highway. It appears from the petition: That the only notice given of the filing of the petition to vacate the highway was one published in a newspaper, and that it did not contain the names of any of the owners or occupants of lands abutting upon the said highway. That the auditor appointed a commissioner to view the road. That he recommended the proposed vacation. That commissioners were appointed to assess the damages, and reported in favor of allowing none. That prior to the appointment of said commissioners the plaintiffs and others filed with the county auditor remonstrances against the vacation of the highway, and plaintiffs at the same time filed claims for damages. That on the final hearing before the board the parties on both sides were present. That evidence was taken, and two days consumed in the hearing, and the board granted the petition, and vacated the highway. That in the district court the defendants demurred to plaintiffs' petition because: *First.* The names of the owners of the land through which the road passes need not be in a notice, because the plaintiffs were then in court, and had appeared in the case. *Second.* Plaintiffs cannot complain that other interested persons did not have notice. *Third.* The petition shows plaintiffs had full opportunity to object to the appointment of appraisers, and that they had no right to object. *Fourth.* The court cannot determine the propriety of vacating said road, it being a matter of discretion reposed in the board of supervisors. *Fifth.* Plaintiffs were in court, and were fully heard on all questions presented in their petition herein. It appears that the cause was dismissed, and judgment rendered against plaintiffs for costs. From this judgment they appeal.—*Affirmed.*

C. G. Johnston and C. M. Brown for appellants.

G. D. Woodin & Son for appellees.

KINNE, J.—I. Code, section 936, provides that “within twenty days after the day is fixed by the auditor, as above provided, a notice shall be served on each owner or occupier of land lying in the proposed highway, or abutting thereon, as shown by the transfer books in the auditor’s office, who resides in the county, * * * and such notice shall be published for four weeks in some newspaper printed in the county.” The statute requires the notice to be personally served upon the owner, as shown by the transfer book, when he resides in the county; if he be a non-resident, upon the occupier of the land, if there be one residing within the county. *Alcott v. Acheson*, 49 Iowa, 570. The petition demurred to does not show that plaintiffs’ ownership appeared upon the transfer book, nor that they resided in Keokuk county. Nor is it alleged that there was any occupier of the land they claim to own, or if there was such occupier, that he was a resident of this state. Hence, no personal notice was necessary as to plaintiffs, or as to the occupier of their land, if there was one. The same is true as to the claimed owners or occupiers of other lands abutting upon the highway. Their ownership is not shown to appear upon the transfer books, nor is it made to appear that they resided within the county. And as to the occupant of said land, if any, it is not averred that he resided within the county or state. *State v. Chicago, Burlington & Quincy R. R. Co.*, 125 Iowa, 111.

such land-owners appeared in the transfer books, it cannot be said that the notice was defective.

II. It is claimed that the proceedings of the board of supervisors are void, because the appraisers were not appointed on the day set for filing claims, but on another day. If this was a case
2 wherein damages might be allowed, this contention would demand consideration. As it is well settled that no damages are allowable for vacating a highway, it is wholly immaterial when the appraisers were appointed. *Grove v. Allen*, 92 Iowa, 519 (61 N. W. Rep. 175; *Brady v. Shinkle*, 40 Iowa, 576; *Ellsworth v. Chickasaw County*, 40 Iowa, 571. We have treated the case upon the petition and demurrer, and upon the assumption that the demurrer was sustained. It does not, in fact, appear that the demurrer was ruled upon. The statute contemplates that the hearing and judgment of the court below should be upon the return to the writ, the facts as therein certified, and other testimony which may be introduced. Code, section 3222. By agreement entered into in the court below, the court was to take the returns into consideration in determining the demurrer. The judgment entered would indicate that the demurrer was overlooked, and the case disposed of on its merits. As, in any event, the demurrer should have been sustained, and neither the petition nor return warranted any relief to plaintiffs, the court did not err in its judgment.—AFFIRMED.

HENRY HARRIS, Appellant, v. HARRIETT BRINK.

Fraudulent Conveyance: FUTURE SUPPORT. Property conveyed by a debtor in consideration of an agreement for his future support, is chargeable with a lien in favor of existing creditors who have no other means of enforcing their claims, to the extent that the value of the property and of its use exceeds the amount of the support actually furnished by the grantee, in good faith.

Appeal from Allamakee District Court.—HON. E. E. COOLEY, Judge.

SATURDAY, DECEMBER 12, 1896.

SUIT in equity to set aside a conveyance of real estate, made by John Harris to the defendant, and to subject the property to payment of a debt due to the plaintiff from Harris, and for other relief. There was a decree for the defendant, and plaintiff appeals.—*Reversed.*

Stilwell & Stewart for appellant.

M. B. Hendrick for appellee.

ROTHROCK, C. J.—John Harris died on the sixth day of September, 1891. The plaintiff claims that when Harris died he was indebted to the plaintiff in the sum of two hundred and fourteen dollars and fifty cents, and interest. The deceased had no money and no property of any kind when he died. He had been the owner of a farm of forty acres, and some cattle, and some other personal property. On the twenty-sixth day of May, 1890, he executed and delivered to the defendant a quitclaim deed for the farm. The following is a copy of said conveyance: "I, John Harris, widower, in consideration of eight hundred dollars

in hand paid, do hereby sell and quitclaim unto Mrs. Hattie Brink the following described premises, the NE NW of 22-98-6. And it is expressly agreed that a part of the consideration herein is the future support of the said John Harris by the said Hattie Brink, and a failure of the said Hattie Brink to furnish the said John Harris proper support and all necessary clothing and forty dollars cash each year, and care in sickness and in health, and furnish and pay all doctor bills of John Harris during all his life, shall be a failure of the consideration hereof, and shall work a forfeiture of this deed, and the said Hattie Brink, on condition that she shall give my body a suitable burial, shall have all property, personal and real, left by me at my death, and the said John Harris hereby relinquishes his right of dower and homestead in and to the same." There was no incumbrance, or lien, upon the land, and there is no question that Harris was the owner in fee simple, and had the right to sell and dispose of it. He had no wife living and no children. He had owned the farm for many years, and he and a daughter occupied it as a home. He conveyed the land to his daughter, and at her death, which occurred May 13, 1890, he inherited the property from her. The plaintiff is a brother of John Harris. He alleges in the petition that the conveyance to Mrs. Brink was fraudulent as to the creditors of Harris, and that it was absolutely void as to the heirs of Harris, for the reason that he was incapable mentally of making a disposition of his property by deed. It is also averred that the plaintiff is the only heir at law of the deceased, and the relief demanded is that his claim as a creditor be established as a lien upon the farm, and that he be declared to be the owner of the fee in the land by inheritance. All of the averments of the petition were denied in the answer. Numerous witnesses

were examined by the respective parties. We will not set out and review the testimony. It will be sufficient to state facts which we believe to be established by a preponderance of the evidence: (1) At the time of the death of John Harris he was indebted to the plaintiff in the sum of two hundred dollars. All of his claim, except thirty-five dollars for money loaned, consisted of items of account for the use of horses, and for hogs sold to the deceased, and for hay and grain furnished to him to feed his stock. The amount claimed in the petition was two hundred and fourteen dollars and fifty cents. We deduct all in excess of two hundred dollars, for the reason that we think one charge for a coat ought not to have been made, and other items appear to be overestimated. This account ought to draw interest at six per cent. from November 15, 1890. (2) John Harris was about seventy-six years old when he died. For a number of years before his death, he was greatly afflicted with rheumatism, so that he was very feeble, and walked with difficulty, and in a stooping position. But there is no satisfactory evidence that he was mentally incapable of making a contract or a will. He knew just what he was doing when he executed the deed to Mrs. Brink. (3) A few days after the conveyance was made, Harris, by a bill of sale, transferred some cattle to the defendant, of the value of seventy dollars. At the time of both transactions, defendant knew that Henry Harris claimed that John Harris was indebted to him. She also knew that W. C. Earle had a claim against him. It is true that she did not know that the claims were valid obligations. John Harris denied to her that he was in debt to the plaintiff. (4) At the time of the conveyance the farm was worth one thousand two hundred dollars, and the cattle were of the value of seventy dollars. At the date of the trial in the district court, the defendant had been in possession of

the farm for about five years, and the use and occupation was worth five hundred dollars. The defendant paid debts and funeral expenses of Harris and his daughter, and nursed and cared for him until he died, and the total value of the services and money paid was six hundred and thirty-five dollars. It therefore appears to us that, including the use of the farm, the defendant has received property of the value of one thousand seven hundred and seventy dollars, for which she has given as a consideration about six hundred and thirty-five dollars. The principal part of this sum consists of the value of the services rendered in caring and providing for Harris from the time of the death of his daughter until he died.

It appears to be well settled that, where the consideration for a conveyance is an agreement for the future support of the grantor, the transaction is fraudulent in law as to the creditors, to the extent which the value of the property is in excess of the support furnished. The authorities proceed upon the theory that it is the legal duty of a debtor to pay his debts, rather than to provide for his future support, and that existing creditors may avail themselves of property conveyed for future support for the payment of their claims, when the debtor has no other property out of which payment can be enforced. *Walker v. Cady* (Mich.) 63 N. W. Rep. 1005; *Kelsey v. Kelley*, 63 Vt. 41 (22 Atl. Rep. 597); *Farlin v. Sook*, 30 Kan. 401 (1 Pac. Rep. 123); *Henry v. Hinman*, 25 Minn. 199; *Faber v. Matz*, 86 Wis. 370 (57 N. W. Rep. 39). And where the parties have acted in good faith, the conveyance may be sustained, so far as the consideration paid by the grantee, without notice, is involved, but will be set aside as to any value in the property in excess of the amount paid; and in such case the grantee is chargeable with the value of the use of the property. *Loos v. Wilkinson*, 110 N. Y. 195 (18 N. E. Rep. 99); *Gould*

v. Hurto, 61 Iowa, 45 (15 N. W. Rep. 588); *Redhead v. Pratt*, 72 Iowa, 99 (33 N. W. Rep. 392); *Gaar, Scott & Co. v. Hart*, 77 Iowa, 597 (42 N. W. Rep. 451). Applying these well-settled principles to the facts as we have found them to be, we think the plaintiff is in equity entitled to have his claim to the amount of two hundred dollars, with interest, as above stated, established as a lien against the farm. We do not believe that the defendant acted in bad faith. She did faithful service for John Harris and his daughter, for which she should be well recompensed. While she knew that the plaintiff had some demands which he asserted against Harris, yet her information from him was, that he was in no way indebted to his brother. The decree of the district court is reversed, and the cause is remanded to the district court for judgment and decree, in harmony with this opinion.—REVERSED.

THE CREAMERY PACKAGE MANUFACTURING COMPANY,
Appellant, v. THE UNION BANK OF WILTON.

Construction of Pleading: **ISSUE TENDERED:** *Replevin*. A petition in replevin alleged that a separator sold by plaintiff under a contract whereby the purchaser was to hold the same or its proceeds in trust for plaintiff, subject to his order, was claimed by defendant under a chattel mortgage from the purchaser, and that defendant did own the property; but there was no allegation as to value, or that plaintiff had demanded or was entitled to possession of the property, and no attack was made therein on the validity of defendant's mortgage. *Held* that the claim that defendant took the

THIS is an action of replevin for the possession of a cream separator. Plaintiff's claim is based upon a written contract or order for the sale of the separator, in which is found the following provision: "All goods and the proceeds of sales of goods received under this contract, whether the goods are in notes, cash, or book accounts, we agree to hold the same as collateral security in trust, and for the benefit of, and subject to the order of, the Creamery Package Manufacturing Co., until we have paid in full cash all our obligations due said Creamery Package Manufacturing Co." Defendant claimed the separator by virtue of a chattel mortgage on it. Plaintiff argues that defendant took its mortgage with actual notice of the plaintiff's interest in the property, and that the description of the separator was in fact inserted in defendant's mortgage after it had been fully executed and acknowledged. Trial was had to the court, and a judgment entered for the defendant, from which this appeal is taken.—*Affirmed.*

Richman & Burk for appellant.

R. M. Detwiler for appellee.

KINNE, J.—I. The petition of plaintiff does not allege that it was entitled to immediate possession of the property. It does not state the extent, or character, of plaintiff's interest therein, but leaves the court to ascertain the same from the terms of the order, which, it is said, creates and evidences its interest. It is not alleged in terms that the defendant's possession of the separator was wrongful. No demand for the possession of the property is alleged to have been made. No issue is tendered as to its value. The defendant's mortgage is admitted and not avoided, but it is said that Kelly did not own the property and

hence could not mortgage it. In view of this condition of the petition we are not called upon to consider many questions argued by the appellant. In the pleadings no attack is made upon the validity, or efficacy, of defendant's mortgage. No issue is made that defendant took its mortgage with notice of plaintiff's claim upon the property. Nor is the fact that the description of this separator was inserted in the mortgage, after its full execution, pleaded. As we look at the pleadings, no question of notice, or forgery, is in issue. Even if such facts were properly in issue, the evidence is conflicting, and we should not be authorized to set aside the findings of the district court, which stand as the verdict of a jury. It must not be expected that we will enter into the consideration of questions argued which are not in issue. The judgment below was correct, and it is **AFFIRMED**.

ROBERT S. ROBERTS, Appellant, v. MICHAEL MALLOY,
et al.

Appeal: REFUSAL TO ENTER DEFAULT. An appeal from the refusal of the court, upon the objection of defendant's attorneys appearing as *amicus curiæ*, to enter default in favor of plaintiff, will be dismissed where the record does not show the ground of the court's refusal, or that an answer was not on file.

Appeal from Keokuk District Court.—HON. HENRY
BANK, JR., Judge.

SATURDAY, DECEMBER 12, 1896.

THIS is an action for damages arising from the

on September 4, 1894, demanded a default against the defendants, which was refused. Plaintiff excepted to said ruling, and appeals.—*Dismissed.*

J. F. Smith for appellant.

James C. Davis, B. A. Dolan, A. L. Parsons, and R. M. Marshall for appellees.

KINNE, J.—The abstract sets forth an original notice, which contains the following as a part of the title: "State of Iowa, Lee County—ss.: In the Superior Court of Keokuk, Lee County, Iowa, September Term, 1894." The body of the notice is to the effect that there was a petition on file "in the clerk's office of the superior court aforesaid at Keokuk, * * * and unless you appear thereto and defend on or before noon of the next regular September term of said court, to be begun and holden at Keokuk * * * on the third day of September, A. D. 189—," etc. Except as to the time of appearance, the notice is in all respects full and complete. On the regular default day the plaintiff demanded a default, whereupon defendant's attorneys appeared *amicus curiæ*, and filed objections to a default. The court took the matter under advisement, and thereafter refused a default. In view of the condition of this record, we think no appeal lies from the order refusing to enter a default. The record fails to show the ground of the court's refusal. It does not show that an answer was not on file. For aught that appears, the court may have required the attorneys who appeared as *amicus curiæ* to file an answer. He merely stood upon the court's refusal to enter a default, which action of the court may have caused a continuance of the case, but it does not appear that any substantial right was determined by the court's ruling. The

order, not appearing to be one affecting a substantial right, or one which, in effect, determined the action, or one involving the merits of the case, cannot be appealed from. Code, section 3164; 2 Am. & Eng. Enc. Pl. & Prac. p. 105. The defect in the record being jurisdictional, we cannot consider the question of the sufficiency of the notice.—DISMISSED.

JAMES H. EASTON, Appellant, v. JANE F. DOOLITTLE,
et al.

**Equitable Redemption from Tax Sale: NEGLIGENCE OF REDEMP-
TIONER** An owner of land, who, though offering to pay the taxes thereon, which were refused by the treasurer, through mistake, on the ground that they had been previously paid, knew of the sale of the land for non-payment of such taxes before the expiration of the time for redemption, and failed to redeem, is guilty of negligence which will defeat his recovery, in an action in equity, brought thereafter, to be allowed to redeem.

Appeal from Howard District Court.—HON. W. A.
HOYT, Judge.

SATURDAY, DECEMBER 12, 1896.

ACTION to quiet title and redeem from a tax sale of land. Judgment for defendants, and the plaintiff appealed.

Barker & Upton for appellant.

H. T. Reed for appellees.

GRANGER, J.—This action was originally commenced in 1876, to quiet the title to forty acres of land. Since, there have been changes as to parties and the subject-matter so that it now stands as an action to permit redemption of, and quiet the title to, the southwest quarter of section 5, township 98, range

13, in Howard county, Iowa. In 1870 this land was sold for the taxes of 1869. The petition represents that in 1870 the plaintiff, who then owned the land, applied to the treasurer of Howard county to pay the taxes on the land for the year 1869; that the treasurer informed him that the taxes were already paid; that an examination of the books showed that the taxes were so paid; that plaintiff then offered to pay the taxes, which the treasurer refused; that thereafter the treasurer erased the credit for said taxes on the books of his office, and, in October, 1870, sold said land for the taxes of 1869. It is charged that the sale of the land in question, with other lands, was a "ring sale," or a sale made under a combination of bidders to prevent competition, and hence fraudulent. It further appears, from the petition, that changes have been made in the ownership of the tax-sale interest, not important to be noticed here. The answer puts in issue the averments of the petition, except as to the tax sale and conveyance of the land thereafter; and it is alleged that, as early as 1871, and long before the expiration of the period of redemption, the plaintiff knew the land had been sold for the taxes of 1869, and negligently failed to redeem the same from said sale; and it is said that he is now estopped to claim any right or title in said land. It is undoubtedly true that plaintiff intended, and attempted, to pay the taxes in 1870, for the year for which the land was sold. It is quite apparent that the reason for not paying them was that, by some mistake, an entry had been made on the books of the treasurer showing the taxes paid on that land when they had not been paid, which led to the refusal of the treasurer to receive the taxes from the plaintiff. It was when the mistake was discovered that the treasurer erased the credit and sold the land for delinquent taxes. Up to this point, the equities are strong in favor of the

plaintiff. He had done all that he could well do, and the fault was not his that the taxes were not paid. However, he knew that he had not paid the taxes, and it was morally certain that the credit was there by some mistake. We go to the full extent that the plaintiff can well ask if we say that, so long as the credit stood, and until he had notice that it no longer stood, he was protected from further diligence or duty in the matter. That the plaintiff had knowledge that the land had been sold for taxes, before the time of redemption expired, there is little room for doubt. In fact, it is practically confessed. He was a witness, and said: "Can't tell, now, when I first learned that the land was sold for taxes, I knew it in 1875. Q. Will you testify that you did not know it in 1871? A. No, sir; I will not. I am not able to state now, when and how I learned that this land was sold for taxes. I have dealt in Howard county tax lands to a considerable extent, and was in Howard county in 1869 and 1870 and 1871, looking after my land interests there. I do not remember that I knew this land was sold for taxes before the redemption expired, but I take it for granted that I did." The witness takes for granted just what the record would justify the court in finding, as a conclusion from the record, that, in the nature of things, he had such knowledge because of his presence and dealings with tax lands in the county during the years of the period of redemption, and the peculiar facts as to this land. If he had such knowledge, and failed to redeem, what is the rule of law applicable? We do not understand it to be now claimed that there should be a decree for plaintiff except on condition that he redeems. The case of *Harrison v. Owens*, 57 Iowa, 314 (10 N. W. Rep. 674), is one for permission to redeem and have the title quieted; and the right was refused under a better showing, as to diligence, than in this case, for in that case

there was something of an effort to redeem, while in this there was none, and there is no excuse offered. The issue as to such negligence is plainly made, so that the opportunity was given to excuse the neglect, if it could be done. The case of *Playter v. Cochran*, 37 Iowa, 258, is also in point. It involves the right to redeem and have the title to land quieted after the period of redemption. In that case the land-owner supposed he had paid the taxes, and under that supposition, he let the period of redemption pass, without even knowing of the sale. It is said in the opinion that "omitting to perform some act which the law enjoins upon a party is usually termed 'negligence,' against the consequences of which courts of equity do not relieve the negligent party." This case is clearly within that rule, for there is the neglect, with knowledge of the fact of sale, to do what the law enjoined. It will be seen that *Town Company v. Davis*, 44 Iowa, 622, *Fenton v. Way*, 40 Iowa, 196, and such like cases, are not in point. This case is ruled alone on the neglect of the party asking relief. In those cases the neglect was that of the officer.

As to the sale being fraudulent, because of a combination of bidders, we think the evidence comes short of showing the fact. But a single witness testifies to the fact of a combination, and that only from recollection after a lapse of about twenty-two years. He was at the tax sales in the county from 1868 to 1872, and there is no claim of such a combination at all of them. In fact, at a part of the sale for 1870, there was competition. Others, who were at these sales from 1868 to 1872, are witnesses in the case for plaintiff, but do not give evidence on that point. Some of the reasons given for the recollection of the witness do not seem to be sustained. While it is not to be said that the witness is mistaken, it should be said that, in view of the burden being with the plaintiff

to show the fraud, the evidence of it is too uncertain. The treasurer of the county at the time, who conducted the sale, was a witness for plaintiff; and, while he knows of bidding being by turns at some of the sales, it appears that it was not so done at all times, and he cannot fix the November sale of 1870 as one at which it was done. In view of the doubts in this respect, the fact is of some importance that, after about sixteen years from the commencement of this suit, and after repeated changes of the petition, the fact as to the fraud is first pleaded. It is not pretended that these combinations or frauds were secretly carried out, but, on the other hand, the proceedings were open and notorious, and must have been so known as not to be in any sense concealed frauds. The judgment is AFFIRMED.

ESTHER SEDDON, Appellant, v. STATE OF IOWA.

Setting Judgment Aside: FRAUD OF SUCCESSFUL PARTY: *Power of sheriff in liquor injunction suits not brought by him.* Under Code, section 1551, making it the duty of peace officers to execute the liquor law, and to make complaint on being informed of its violation, a sheriff is a representative of the state in actions under such law, only where he is complainant; and in civil action for an injunction, commenced by the county attorney on behalf of the state, statements made by the sheriff to the defendant, which induced such defendant to make default, do not constitute fraud on the part of the successful party, authorizing a vacation of the judgment.

UNAVOIDABLE MISFORTUNE. Where a defendant failed to appear and defend an action by the state, in reliance on statements made by the sheriff, who had no authority to bind the state as plaintiff,

THIS is a proceeding to vacate a certain liquor injunction decree rendered by the district court of Appanoose county on the fourteenth day of May, 1895, in an action wherein the state was plaintiff, and the plaintiff herein and one William Wilson were defendants, on the grounds: (1) That the decree was irregularly obtained; (2) that it was obtained through fraud practiced by the successful party in obtaining the decree; (3) for unavoidable misfortune, preventing the plaintiff from appearing and defending the main case. The lower court sustained a demurrer to the plaintiff's petition, and she appeals.—*Affirmed.*

C. F. Howell for appellant.

C. W. Vermilion and *H. E. Valentine* for appellee.

DEEMER, J.—It may be conceded that plaintiff sets forth facts in her petition which would have constituted a defense to the original action had she appeared and presented them at a proper time. Her petition was presented, however, after the term at which the decree was rendered, and it is necessary for her to establish some one or more of the grounds alleged by her as a reason for vacating the decree. That she was duly served with an original notice of the suit in which she and Wilson were defendants is conceded, and it is also admitted that she permitted a default to be taken against her and the property of

1 which she was the owner, upon which it was claimed the nuisance existed. But she says that the sheriff of the county stated to her husband,—who was her agent,—after the original notice was served, that: "You folks have done all you can to right yourselves. You put the nigger out, and that is all we can expect of you. We ain't going to ask anything against you folks; so don't bother yourselves

about the matter." She also claims that the deputy sheriff said to her at the time he served the original notice: "That if I would have the man who was using the lot, stop selling in the place, I would not be hurt. You go down and get him off, and you will be all right. That is all we will ask of you." She further says that she immediately removed the occupant from the lot, and supposed that was the end of the case. She also says that her husband informed her of the statements made to him by the sheriff, and that for these reasons she did not appear and defend the case. There is no reason for asserting that the decree was not regularly obtained. The only questions in the case are, do these statements, which were made by the sheriff and his deputy, constitute such fraud by the successful party as will furnish sufficient grounds for vacating the judgment, or should we say from the whole record, that there was such unavoidable misfortune, preventing the plaintiff from defending, as entitled her to the relief prayed? It will be noticed that the statements made to the plaintiff, and upon which she relied, were not made by the successful party, unless it be held that the sheriff and his deputy were either the successful parties, or that they represented the party who succeeded in such manner as that statements made by them would be binding upon the plaintiff in the main suit. That these officers were not the persons who succeeded in the main suit, must be conceded, and that such officers do not ordinarily represent either of the parties to a suit, so that declarations, such as those relied upon in this case, would be binding, must also be conceded. As a general rule, the sheriff is not such an officer of the state as to bind it by any such representations as are here relied upon. Such statements are without actual or apparent authority, and are not necessary to, or in line with, the discharge of his official duty. It is said on

behalf of appellant, however, that this general rule is changed by section 1551 of the Code, which provides, in part, that "all peace officers shall see that the provisions of this chapter [the one relating to intoxicating liquors] are faithfully executed, and when informed that the law has been violated, or when they have reason to believe that the law has been violated, and that proof of the fact can be had, such officers shall go before a magistrate, and make information of the same and of the person so violating the law." It is sufficient to say, in answer to this contention, that the original action was not instituted by the sheriff under the provisions of the statute quoted. It was a civil suit, brought by the state, through the county attorney, to secure a writ of injunction; and the sheriff had no other connection with it than to serve the papers as he would in any other action. The statute does not make him the general agent of the state in such matters. He is a special agent when acting under this statute, and is limited in authority. In the case of *Fries v. Porch*, 49 Iowa, 351, in construing this statute with reference to the power and authority of a sheriff who had seized intoxicating liquors under and by virtue of a search warrant, we said: "He [the sheriff] had no more authority to agree that plaintiff might take judgment for the possession of the liquors than he would have had to consent that in a proceeding of *habeas corpus* judgment might be entered for the discharge of the prisoner." Again, in the case of *State v. Haskell*, 20 Iowa, 276, we said, in construing powers of public agents in general, that "such an officer cannot bind the state when he does an act or makes a representation which is not within the scope of his authority." It is clear that the state never authorized, either expressly or by implication, the statements made by the sheriff or the deputy in this case. And if this be true, it follows

that the plaintiff had no right to rely upon them.

2 There was no fraud, then, practiced by the successful party in obtaining the judgment. Was there such unavoidable misfortune preventing the plaintiff from defending as entitles her to relief? We think this question is answered by the last preceding statement that the plaintiff had no right to rely upon the representations of the officers. If it was a misfortune, it was not unavoidable, for plaintiff must have known that she had no right to rely on the statements so made. But we do not think there was such a misfortune or casualty—such a calamity or mishap or unlucky accident—as law contemplates when it makes misfortune a ground for vacating a judgment. The cases of *Teabout v. Roper*, 62 Iowa, 603 (17 N. W. Rep. 906), and *Heathcote v. Haskins*, 74 Iowa, 566 (38 N. W. Rep. 417), are in point upon this proposition. The district court correctly sustained the defendant's demurrer, and its judgment is AFFIRMED.

HENRY ALBORN, SR., Appellant, v. BARBARA ALBORN
AND J. D. PAYNE, Sheriff.

Replevin: IRRELEVANT EVIDENCE. The petition in a suit by a wife, for separate maintenance, is not admissible, in an action by her father-in-law, against her and the sheriff, for property seized under attachment in the former action, where the only issues in the replevin suit are those relating to ownership and change of pos-

ACTION for the recovery of specific personal property. Verdict and judgment for defendant, and the plaintiff appealed.—*Reversed.*

White & Clarke and *H. A. Hoyt* for appellant.

Edmund Nichols and *W. W. Cardell* for appellee.

GRANGER, J.—The property in controversy is a horse, a lumber wagon, harness, buggy, and five hundred bushels of corn. The property was taken by the defendant sheriff on a writ of attachment in a suit by the defendant Barbara Alborn, for her separate support, against her husband, Henry Alborn, Jr., a son of the plaintiff in this case. The plaintiff's ownership of the property is made to depend on the facts that he raised the corn on his farm, and that he purchased the other property from his son Henry Alborn, Jr., January 15, 1894. The answer puts in issue the fact as to the plaintiff's ownership of the property, and charges that any sale thereof between plaintiff and his son Henry was fraudulent, and done in pursuance of a conspiracy to place the property beyond the reach of Barbara Alborn, and that there was no change of possession of said property in pursuance of the sale, and that defendants had no notice of such sale. The verdict was for defendants for all the property.

Under the pleadings, the issues for trial were: *First.* As to the ownership of the plaintiff, because he raised the corn and bought the other property. *Second.* Was there such a change of possession that the sale, if made, was valid? *Third.* Was there fraud such as to defeat the sale? The instructions

against objections, that it was immaterial and irrelevant, it was admitted. We do not see the materiality or relevancy of such evidence. The petition recited facts as to treatment of Barbara Alborn by her husband, showing neglect, poverty, sickness, the birth of her child, and that she was compelled to look to the county for assistance, because of her husband's failure to support her. The facts stated in the petition are in no way relevant to the issues presented. The writ of attachment and seizure thereunder would show the rightful possession of the sheriff, except as against plaintiff's ownership, if it was necessary to establish such fact under the issues. That fact did not seem to be questioned on the trial. All the issues went to the fact of plaintiff's ownership, so that, because of it, he was entitled to the possession of the property. If his right of possession was not established, the defendants must recover. The right of the parties to this suit in no way depended on facts as to Barbara Alborn and her husband, and, if it did, the petition was not legal proof of the facts. There is little room for elaboration. Such evidence must have been prejudicial. As there is no argument for appellee, we do not discuss other questions. See *Pumphrey v. Walker*, 75 Iowa, 408 (39 N. W. Rep. 671); *Dodd v. Scott*, 81 Iowa, 319 (46 N. W. Rep. 1057), and cases there cited. The judgment is **REVERSED**.

CLENDENEN Boggs, Appellant, v. ARCHIE DOUGLASS.

Creditors' Bill Judgment: PURCHASE OF SAME BY FRAUDULENT GRANTEE. A purchaser of land against whom suits have been commenced by judgment creditors of his vendor to set aside the sale for fraud, and establish their judgments as liens on the land, may purchase a judgment on which such suit is based, and will take with it a lien created by the filing of the creditors' suit, which is entitled to priority over the liens of other judgments on which suits were subsequently commenced.

ENFORCEMENT AGAINST JUNIOR CREDITORS' BILL JUDGMENT. In such case, the purchase of the judgment by the defendant, who is the owner of the land, is equivalent to an admission of the validity of the lien, which renders the trial of the action unnecessary; and he may set up the lien by cross-petition, and have it established, in an action for possession based upon a decree upon a junior lien.

Appeal from Monroe District Court.—HON. ROBERT SLOAN, Judge.

SATURDAY, DECEMBER 12, 1896.

FEBRUARY 17, 1883, Aaron and William Hicks, being then indebted to plaintiff and others, conveyed to the defendant eight hundred and thirty-five acres of land, and he entered into possession of the same. Suits were brought by creditors of the Hickses, and the land attached, and judgments were entered ordering the sale of the same. Plaintiff's judgment was rendered April 17, 1883, and a judgment in favor of one Casaday, April 19, 1883. May 16, 1883, said Casaday filed a creditors' bill, charging that the conveyance to the defendant herein was fraudulent, and asking that it be canceled, and that the real estate be sold to satisfy his said judgment. Douglass and the Hickses filed an answer admitting the judgment and conveyance, but denying the alleged fraud. November

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10, 1883, plaintiff herein filed a like petition, to which the defendant made answer. Plaintiff herein prosecuted his creditor's bill suit, and on March 4, 1887, secured a decree in conformity to the allegations of his bill. The suit on the Casaday judgment is still pending. The Casaday judgment, however, was assigned to one Steele, and by her to the defendant herein on March 30, 1887. Plaintiff herein enforced his decree by sale of certain lands, for which he received a sheriff's deed on June 15, 1888. He demanded possession thereunder of defendant herein, Douglass, and, being refused, brought this suit on September 27, 1888, to establish his title, and for possession, claiming absolute ownership to the land by virtue of his sheriff's deed. In this suit Douglass claimed title and possession in himself under the deed from the Hickses of date February 17, 1883, and by way of cross-bill pleaded that judgments had been rendered against the Hickses in favor of Casaday, Wallace and Ramsey, and that creditors' bills had been filed thereon, and also pleaded that all of said judgments had been assigned to him, whereby he claimed an equitable lien on said land for the amount of said judgments prior to the lien of plaintiff, Boggs, and asked that Boggs be required to pay said judgments before being allowed to question his (Douglass') title under the deed from the Hickses. This cause was tried March 7, 1891, and a decree entered in the lower court awarding to Douglass the relief prayed in his cross-bill. Boggs appealed, and this court filed an opinion October 9, 1893, in said case. See 89 Iowa, 150 (56 N. W. Rep. 412). A procedendo issued upon the decree, under which the district court found and decreed that the Casaday judgment and creditors' bill thereon, in view of the assignment thereof to Douglass, operated to create a perfect lien in his favor and that he was entitled to the benefit of such

lien, and to be protected in its enforcement; and decreed that said lien is superior, as to the land in controversy, to the lien of plaintiff, by virtue of his sheriff's deed; and foreclosed the lien in favor of Douglass as against plaintiff and the other defendants; and directed the issuance of a special execution thereon for the sale of Aaron Hicks' interest in the land in controversy for the amount of said Casaday judgment, interest and costs, and that the purchaser at said sale should take title to said land free of plaintiff's lien and claim, subject to plaintiff's right of redemption. From this decree, plaintiff appeals.—*Affirmed.*

William A. Nichol for appellant.

T. B. Perry for appellee.

KINNE, J.—Plaintiff contends that the decree entered in the court below is erroneous, because not in accordance with the opinion of this court, to which reference has been made. That opinion found that plaintiff was the holder of the legal title to the land, and entitled to its possession; that such rights were subject to Douglass' right to "enforce the lien created by the Casaday judgment, and the petition in equity filed to enforce it;" that the lien created by said Casaday judgment and creditors' bill was paramount to plaintiff's lien under which he acquired the legal title to the land; that Douglass' lien did not give him the right of possession as against plaintiff, until it had been enforced. Plaintiff, then, was entitled to the possession of the land, subject to the paramount claim of Douglass under the Casaday judgment and creditors' bill, whenever that claim should be legally enforced. So long as the Casaday judgment was in force, and the bill was pending upon it to set aside

the sale from the Hickses to Douglass, and so long as the latter was the owner of said judgment, he (Douglass) held an enforceable lien against the property; and if, at any time while it was so held, it ripened into an execution and sale of the property, the purchaser thereunder would take a title free and clear of plaintiff's claim and lien, because the bill was filed on the Casaday judgment prior to the time of the filing of the bill on plaintiff's judgment, and the lien of Douglass would, therefore, be paramount. But so long as Douglass had an enforceable but unenforced lien, neither he, nor any one else claiming thereunder, could claim or hold possession of the premises thereunder, as against plaintiff. Plaintiff contends that the court could make no order for the enforcement of the lien of the Casaday judgment and creditors' bill until a trial was had thereon, and the fraud alleged in the bill established by evidence; that, when the opinion speaks of the right of Douglass to enforce "the lien created by the Casaday judgment and the petition in equity to enforce it," it refers to such a trial. It may be admitted that ordinarily the lien acquired by the filing of a creditors' bill to set aside a sale on the ground of fraud is not such as to authorize a court to, without proper proof of the averments of the bill, order a sale of the property on the judgment. Here, however, we have a case where the alleged fraudulent grantee, Douglass, has become the purchaser of a judgment upon which a creditors' bill has been filed against him to set aside the conveyance of the land to him as fraudulent. He had a right to purchase the Casaday judgment, and with it he took the liens which had been created by the filing of the creditors' bill thereon. See *Bank v. Loomis*, 100 Iowa, 266 (69 N. W. Rep. 443); also, *Fordyce v. Hicks*, 76 Iowa, 44 (40 N. W. Rep. 80), wherein the question of the purchase of this and other judgments is considered. It is there said: "The mere

fact that he is a fraudulent grantee can make no difference. He was the owner of the real estate, and as such he had the right to pay off, or purchase, the indebtedness of his grantors. He could thus pay or obtain all or a part of such indebtedness, and in that way perfect his title against the only parties who could question it." *Smith v. Grimes*, 43 Iowa, 356.

Now, plaintiff's contention amounts to this: That Douglass, who was adjudged in plaintiff's other suit to be a fraudulent grantee of the property, shall, in the creditors' bill filed upon the Casaday judgment, which he (Douglass) now owns, establish that he (Douglass) is a fraudulent grantee, in order to secure the benefit of the payment of the Casaday judgment, which is a paramount lien to plaintiff's, because the bill on the Casaday judgment was first filed. We do not think this is the law. Being the absolute owner of the land as against the whole world except the creditors of the Hickses, he had the right to virtually admit the truth of the allegations of the bill, and purchase the judgment. Such lien was in no way connected with or dependent upon the fraudulent conveyance. No claim is made that Douglass colluded with any one to avail himself of the benefit of a judgment which was not in all respects valid and just for the purpose of obtaining a lien prior to that of plaintiff. Why should Douglass, in order to avail himself of the benefit of the Casaday lien, be compelled to go through the farce of a trial? What principle of law prevents him from admitting a fact which he knows could be established by evidence, and thus acting upon it in protecting his title? We discover no reason in such a case for requiring the grantee to establish, in a trial, fraud as against himself, before he can have the benefit of a prior lien which he has purchased. The opinion of this court does not contemplate or require such procedure in this case. The Casaday lien and creditors' bill was properly

enforced by the decree complained of, which foreclosed the lien, and ordered a sale of the property. The plaintiff's rights are fully preserved by the decree, and he has no just cause of complaint.—AFFIRMED.

O'LEARY BROTHERS V. THE GERMAN-AMERICAN INSURANCE COMPANY OF NEW YORK, Appellant.

Insurance: WAIVER BY AGENT. An agent of an insurance company may be authorized by the company to waive orally the requirements of the policy as to proofs of loss, although the policy itself provides that no officer, agent, or representative of the company shall be held to have waived any of the conditions of the policy unless the waiver is in writing, indorsed thereon; as the requirement as to writing may itself be waived by the company.

WARRANT: *Fraud.* A condition of a policy of insurance limiting the total insurance to three-fourths of the cash value of the property, is not a representation of warranty, and the policy is not avoided by innocently exceeding the limit.

CONSTRUCTION OF PLEADING. In an action on an insurance policy, an answer which in one count alleges other insurance as a ground for avoiding the policy, and in another count asks to prorate other insurance, if any may be found, does not allege the existence of other insurance, as a basis for prorating the loss.

Declarations of Agent: AGENT AS WITNESS. The rule, that the authority of an agent cannot be sustained by his own declarations, does not render it improper to prove his authority by his testimony.

Striking Testimony: POWERS OF AGENT: *Written contract.* An alleged special adjusting agent gave testimony tending to show that he had authority to orally waive proof of loss. No objection that he was acting under a written contract of employment was interposed, and the witness was dismissed. Plaintiff then gave evidence tending to show that said agent did orally waive proof. The agent then being recalled for further cross-examination, it appeared that he was employed in writing, and that the contract was in Illinois. It also appeared, inferentially, that the contract did not specify his duties, for the reason that he was to go to such places and do such work as should be directed by the manager.

Held,

a. As the testimony of the plaintiff was rightfully admitted, as the record stood at the close of the first examination of the

agent, said testimony, subsequently elicited, did not authorize the striking of plaintiff's said evidence.

- b. It does not appear that the writing deprived the agent of power to waive proof of loss, orally.

Plea and Proof: WAIVER: *Proof of loss.* The fact that plaintiff, after the expiration of the time allowed, attempted to make proof
4 of loss, does not affect his right to recover on a plea that such proof was waived.

Instructions. The court may, in its charge, refer to other paragraphs
8 thereof, without repeating them.

Special Interrogatories. Code, section 2808, providing that the jury must be required, on the request of a party, to find specially on
6 questions of fact stated to them, in writing, does not require the court to submit interrogatories as to immaterial facts, or facts necessarily determined by the general verdict.

Appeal from Iowa District Court.—HON. S. H. FAIRAIL, Judge.

SATURDAY, DECEMBER 12, 1896.

THIS action at law was begun April 16, 1892, to recover upon two policies of insurance against loss by fire, issued by the defendant. One is to the plaintiff for seven hundred and fifty dollars, on a stock of agricultural implements and goods contained in a certain store building in Williamsburg, Iowa, and the other to D. J. O'Leary for two hundred and sixty dollars on said building, which last-named policy has been assigned to the plaintiffs. The issues will sufficiently appear in the opinion. Verdict and judgment were rendered in favor of the plaintiffs. Defendant appeals.—*Affirmed.*

McVey & Cheshire for appellant.

power to waive proofs of loss, and that he waived proofs of these losses. This was denied, and appellant's first contention is that there is no legal evidence that Mr. Swire has authority as alleged. Mr. Swire was called by the plaintiffs and testified to the effect that he was and had been special agent of the defendant for Iowa for four years; that the defendant had no state agent or adjuster for Iowa; that his duties were to go to such places in Iowa and do such work as he was instructed to do; that he received his instructions from the office of Eugene Carey, western manager at Chicago; that sometimes adjustments of losses were placed in the hands of special adjusters, and when not so placed were generally placed in his hands; and that he had the adjustment of this loss under instruction of the western manager. Defendant moved to strike out this evidence, "on the ground that no agent's authority or agency can be proven by the agent himself." *Moffitt v. Cressler*, 8 Iowa, 122; *Clanton v. Railroad Co.*, 67 Iowa, 350 (25 N. W. Rep. 277); *Bigler v. Toy*, 68 Iowa, 687 (28 N. W. Rep. 17); *Graul v. Strutzel*, 53 Iowa, 712 (6 N. W. Rep. 119); *Renwick v. Bancroft*, 56 Iowa, 527 (9 N. W. Rep. 367); and other cases,—are cited. In *Moffitt's Case* it is said: "To bind the principal by the representations of a third person the agency of such third person must be shown otherwise than by his declaration. He may prove his agency by his own oath, if the authority is conferred by parol, or it may be established in many ways, as

In *Van Sickle v. Keith*, 88 Iowa, 14 (55 N. W. Rep. 43), the defendant was permitted to testify that he was the agent for his wife and her mother. It was urged that this evidence was incompetent to prove the fact of agency. The court says: "This is a misapprehension of the rule. It is the rule that the declarations of the agent are not competent to establish the fact of his agency, and the authorities cited are to that effect. But the declaration of the agent, and his testimony to prove the fact, are quite different. We know of no rule against the agency being established by the testimony of the agent." At the time this motion was ruled upon there was no claim nor evidence that Mr. Swire's employment was evidenced in writing; therefore there was no error in overruling the motion, and, being overruled, there was legal evidence tending to show that Swire had authority as alleged. Plaintiff Daniel O'Leary, being next examined, testified to certain acts and conversations between himself and Swire with respect to said loss and the waiving of proofs thereof, and then Mr. Swire was called for further cross-examination. He stated that his contract of employment was in writing, that it was in the company's office in Chicago, and that he did not have a copy. Thereupon defendant moved to strike all the evidence of Daniel O'Leary as to conversations and doings of Swire on the subject of what he did and his authority, and that tends to prove a waiver of proofs of loss, "because the authority of Swire is in writing," which motion was overruled. If the alleged authority of Swire was established, the testimony of Daniel O'Leary was competent. We have seen that Mr. Swire was a competent witness by whom to prove his agency and powers, if in parol, and that his testimony showed his agency and powers. This evidence was not objected to on the ground that his employment and powers were evidenced in writing,

and was properly received. While it was made to appear later that Mr. Swire's employment was in a writing then beyond the state, it does not appear that his powers as a special agent were expressed therein. We think the contrary may be inferred from the fact that Mr. Swire's employment was not for all, nor for any particular branch of the business, but to transact such particular business within the state as he might, from time to time, be instructed, from the Chicago office, to perform. The instructions given from time to time, rather than the contract of employment, would express the powers which he was to exercise. Following the ruling on this motion, Mr. Swire was again recalled for further cross-examination. He testified that the telegram upon which he acted in this matter came from the company's office in Chicago, and was signed by Roger Porter, "a gentleman in the company's office in Chicago." He produced the telegram, and the defendant introduced it in evidence. The telegram to Mr. Swire is as follows: "Williamsburg telegraphs heavy loss. Send adjuster. No particulars given. Answer. Roger Porter." Under this record, the court was warranted in refusing to strike the evidence of Daniel O'Leary.

II. These policies contain the usual provision requiring the insured, in case of loss, to give notice and proofs of the loss to the insurer. They also contain the following: "And it is further expressly covenanted by the parties hereto, that no officer, agent, or representative of this company shall be held to have waived any of the terms and conditions of this policy, unless such waiver shall be indorsed hereon in writing." There is no claim that a waiver of proofs of loss was indorsed on the policies in

3

to, and did, waive proofs of loss, and instructed to the effect that if they found that he had such authority, and that he intentionally led the plaintiffs to believe that they need not make proofs of loss, and that plaintiffs had a right to, and did, rely thereon, they should find that there was a waiver. Appellant does not question that proofs of loss might be waived, but contends that "the language of the policy expressly limited the power of Swire, and he had no authority to waive proofs of loss," and that the waiver could only be in writing on the policies. These policies do not, as in *Kirkman v. Insurance Co.*, 90 Iowa, 457 (57 N. W. Rep. 953), limit the power of making such waivers to a particular officer. The only limitation is that there shall be no waiver "unless such waiver shall be indorsed hereon [on the policy] in writing." Unquestionably, any officer, agent, or representative of the company having authority so to do, could have waived the requirement as to proofs of loss by indorsement in writing on the policy. Appellant's contention is that it could not be done in any other way, and that, therefore, the court erred in submitting said issues to the jury, and instructing that a waiver could be made otherwise than in writing on the policy. In the well considered case of *Viele v. Insurance Co.*, 26 Iowa, 12, it is said: "The question is this: Can the breach of the condition of the policy against the increase of the risk, without the written consent of the insurers, whereby the instrument became forfeited, be waived by parol, or by the acts of defendant?" After deciding that the forfeiture could be waived, and, if waived, the policy would continue in force, the court proceeds to inquire whether the waiver must be in writing, and uses the following language: "It is argued, that the condition in the policy to the effect that an increase in the risk avoids the contract on the part of the underwriters, unless consent thereto be had in writing, implies that

such consent can be given in no other way. It will be at once remarked, that this restriction is itself a condition, and is just as capable of being waived or dispensed with as any other condition of the instrument and in the same way. There is nothing in the terms of this condition prohibiting its waiver." It is certainly clear, under this authority, that if Mr. Swire had power so to do, he could not only waive the proofs of loss, but also the requirement that it be in writing on the policy. While in some of the many cases on contracts of insurance that have arisen since *Viele's Case*, some statements have been made, in seeming conflict with that case, it will not be found, in any case where the question had been directly involved, that a different rule has been followed. A provision that the waiver of a forfeiture must be in writing is merely as to the manner in which the waiver may be evidenced, and surely this may be waived as well as the forfeiture itself. Appellant cites and relies upon the case of *Ruthven v. Insurance Co.*, 92 Iowa, 316 (60 N. W. Rep. 663), as decisive of this question. That policy provided as follows: "This policy is made and accepted, subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions, as may be indorsed hereon, or added hereto; and no officer, agent, or other representative of this company, shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent, or representative, shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon, or attached hereto." We held that these provisions were a limitation upon the power of the company's local, special, and adjusting agents, but

did not hold that the company could not itself, or by an agent authorized to do so, waive the provisions of the policy as to proofs of loss, and that waivers should be in writing on the policy. The limitation in this policy, quoted above, is not as to the power of officers or agents to waive conditions of the policy, but simply that waivers shall be indorsed in writing thereon. The conclusion reached in that case was not because of the requirement that waivers must be in writing, but because the acts of the persons upon which the plaintiff relied were not authorized. "The party for whose benefit the conditions are introduced may waive the forfeiture." *Viele v. Insurance Co.*, *supra*. If it may be said that the requirement that waivers be in writing on the policy, is for the benefit of both parties, then surely it could be waived, or, rather, superseded by a subsequent agreement by both. If Swire had authority so to do, he and the insured could agree that the waiver might be in parol. In the case of *Kirkman v. Insurance Co.*, *supra*, it was held that the matters relied upon did not constitute a waiver, and that the agent, Stahl, had no authority to waive proofs of loss. The conclusion is not based upon the provision that the secretary alone could waive proofs of loss, and that in writing. In the recent case of *Taylor v. Insurance Co.*, 98 Iowa, 521 (67 N. W. Rep. 577), the contention was whether the agent, Bowen, had authority to waive certain conditions in the policy, and it was held that he had not. That policy provided that no condition therein "could be waived, except in writing, signed by the secretary." The court says: "We need not determine whether there could in any case be a waiver in any other manner than provided by the policy." We think there was no error in submitting to the jury the question whether Swire had authority to and did waive proofs of loss, nor in instructing that such waiver might be

in parol. We are also of the opinion that the jury was warranted in finding that Swire was authorized to and did waive proofs of loss. The fact that, after the lapse of the time allowed, the plaintiffs attempted to make proof of the loss, was immaterial, as recovery was sought upon the ground that proofs had been waived.

III. The policies in suit each contain a provision "that, in the event of loss, this company shall not be liable for an amount greater than three-fourths of the actual cash value of the property covered by this policy at the time of such loss, and in case of other insurance, whether policies are concurrent or not, then for only its *pro rata* proportion of such three-fourths value. Total insurance is hereby limited to three-fourths of the cash value of the property hereby covered, and to be concurrent herewith." The petition is in two counts, one on each policy. The defendant answered each, alleging that the property was insured in other companies named, and in sums stated; that the value of the property did not exceed a sum named; and charging "that said property was insured for its full value and more, and that in consequence thereof there was over-insurance, prohibited by the terms and conditions of said policy, and this policy was void on account of over-insurance." Plaintiffs demurred to these parts of the answer, on the following grounds: "The condition referred to in the policy does not constitute a representation of warranty and there is no allegation of fraud mis-

was sustained, to which defendant excepted, and elected to stand upon the answer. Appellant's counsel discuss the evidence to show that the value of the property was not equal to the aggregate amount of the insurance, and contend that, therefore, the court erred in sustaining the demurrer. That ruling cannot be tested by the evidence, and, as counsel have not otherwise discussed it, we will not consider it further than to say that the ruling seems to be in harmony with the case of *Stone v. Insurance Co.*, 68 Iowa, 738 (28 N. W. Rep. 47), and that the grounds stated in the demurrer were well taken.

IV. Appellant presented in due time five special interrogatories to be submitted to the jury, which the court refused to submit, namely: *First.* What would be the cost, at the time of the fire of replacing
6 the stock of goods covered by policy No. 3,504?
Second. Did plaintiffs rely upon the acts of Roger Swire after the fire, and had they, as reasonable men, the right to rely? *Third.* Did the acts of Roger Swire prevent the plaintiffs from making proofs of loss within sixty days after the fire? *Fourth.* Was any proof of loss made by plaintiffs, and, if so, when? *Fifth.* Were proofs of loss waived by defendant company, and, if so, when? The jury must be required, "on the request of any party to the action, to find specially upon any particular question of fact, to be stated to them in writing." Code, section 2808. It is not error to refuse to submit interrogatories as to immaterial facts, nor that are not ultimate in their nature, that may not be answered by "Yes" or "No,"

page 568 (39 N. W. Rep. 897), it is said: "Of course such fact or facts must be material,—pertinent to the matter in controversy,—and the interrogatories must ask a response as to the existence of some particular fact, and not embrace a series of facts which are necessarily included in, and determined by, the general verdict." See, also, *Hawley v. Railway Co.*, 71 Iowa, 717 (29 N. W. Rep. 787), and *Thomas v. Schee*, 80 Iowa, 238 (45 N. W. Rep. 539). Except the fourth, each and all of these interrogatories embraced facts which, under the issues, were necessarily included in and determined by the general verdict. The fourth was immaterial, for, as already stated, recovery was sought not upon a claim that proofs had been made, but that making them had been waived. There was no error in refusing to submit these interrogatories.

V. Appellant asked an instruction, which was refused, reciting the other insurance, and the amount thereof, claimed to be upon the stock of goods, and directing the jury, if it found the defendant liable, to ascertain what it would cost to have replaced the goods, and to prorate the amount among the companies according to the amount covered by each policy, and "then you will rate three-fourths of the amount found to be the *pro rata* share of this defendant, with interest." While the policy on the goods does provide for prorating the loss, we do not think there was any issue to call for the instruction refused. Appellant, in the eighth paragraph of the answer to the first count of the petition, alleged

policy as to prorating with other insurance, and says as follows: "That if it shall be found that this policy provides, and the other policies thereon are valid, that they shall prorate with this defendant, but that in no event can the liability of this company be more than three-fourths of the actual value of the property." Surely neither of these paragraphs alleges the existence of other insurance as a basis for prorating the loss. The first alleges other insurance, not as a basis for prorating; but as rendering the policy void. The second does not allege other insurance, but asks to prorate if any be found. To entitle appellant to this instruction, facts should have been alleged that entitled it to have the loss prorated. Another instruction asked by appellant and refused, is as to whether appellees had a right to, and did, rely upon what Swire did. This subject was fully covered by instructions given. The same is true of the tenth instruction, refused, and the eleventh is disposed of, in what we have said as to the evidence of Swire's authority being in writing. In this connection, we quote from *Taylor v. Insurance Co., supra*, the following: "The question of chief importance in this case is, what were the powers and duties of the agent, Bowen? It appears, that he had an agreement in writing with the defendant, which was not, however, introduced in evidence; hence his authority and duty to act for the defendant must be determined from what he says in regard to it, and the policy in suit." The refusal to give the fifteenth and sixteenth instructions asked, is complained of. These instructions state elementary propositions that are sufficiently indicated in those given. We discover no error in refusing said instructions.

VI. Appellant complains of the seventh paragraph of the charge, because the court said, "there were no proofs of loss." Such was the fact under

these issues, for, as already stated, it was immaterial, under the issues, that appellees attempted to make proofs of loss after the period fixed. It is also complained, that in this the court refers to other paragraphs of the charge. Surely there was no error in this. If, in each succeeding paragraph, the court must repeat all that has preceded, the charge would be endless and confusing. What we have said disposes of all the questions argued, and leads us to the conclusion that the judgment of the district court should be **AFFIRMED**.

D. B. HUSTON V. THE STATE INSURANCE COMPANY,
Appellant.

Insurance: **HOUSEHOLD FURNITURE DEFINED.** In an insurance policy, the term "household furniture, useful and ornamental," with
1 the added term "family stores," includes books and games, writing materials, child's swing, and child's walker.

EXAMINATION OF ASSURED: *Fraud.* Under a provision of an insurance policy which requires the assured to submit to an examination under oath, misstatements of fact made by him on the examination
3 after a loss, do not avoid the policy, unless the insured knew them to be false, and made them with a fraudulent intent.

Same. Where an insurance policy, by its terms, covers household furniture and musical instruments in a certain house, and contains no limitation as to ownership which would invalidate a
4 claim for a piano owned by the wife of the assured, a claim by the assured for its loss, is no fraud on the insurer, though there may have been a misstatement as to the ownership.

Measure of value. Where a witness testified that a table was worth

100	402
111	380
100	402
126	386

- 2 where this requirement has been stated in a preceding instruction, and there is no request to have the objectionable instruction made clearer.

• *Appeal from Woodbury District Court.*—HON. F. R. GAYNOR, Judge.

SATURDAY, DECEMBER 12, 1896.

ACTION on a policy of fire insurance. Judgment for plaintiff, and the defendant appealed.—*Affirmed.*

Lynn, Sullivan & Foley for appellant.

Sawyer & Van Wagenen for appellee.

GRANGER, J.—I. The defendant company issued to the plaintiff its policy against loss by fire on certain personal property in a house in Sioux City. In April, 1894, a fire destroyed and damaged said property, to recover for which this action is brought. There is a complaint that the court permitted evidence to prove the loss of such articles as books and games, writing material, penholders, inkstand, child's swing and child's walker. The following is the provision of the policy specifying the property insured: "One thousand five hundred dollars on household furniture, useful and ornamental, family wearing apparel, sewing machines, silver and plated ware, watches and jewelry, pictures, paintings, engravings, photographs, mirrors, and their frames (at not exceeding cost), statuary and casts, ornaments, and other articles of virtu, musical instruments, printed books, bound and sheet music, trunks and traveling bags, fuel, family stores, fishing tackle, and firearms, all contained in the two-story frame dwelling situated at and known as No. 3021 Nebraska Street, Sioux City, Iowa." It seems to us that the articles are included in the terms used in the policy, "household furniture, useful and

ornamental," would embrace much of it. The term "household," as a qualifier, is defined: "Belonging to the house and family; domestic, as household furniture." That term, with the term "family stores," clearly comprehend such articles as may not be included elsewhere. It is the evident intention in such policies, by the use of such terms, to embrace what is kept in the family for use in the way of the articles objected to.

II. There is a complaint as to the sixth instruction of the court, wherein it told the jury that to entitle plaintiff to recover he must establish that the property, or some portion, was destroyed by
2 fire on or about April 17, 1894. It is said the instruction omits to state that the fire was without fault of plaintiff, and it is said that fact is nowhere expressed in the instructions. In the preceding instruction the jury is told that, to entitle plaintiff to recover, he must establish the material allegations of his petition. And preceding that, the court specified the allegations, including the fact of the fire occurring "without his fault." It seems to have been the purpose of the sixth instruction to, in a brief way, enumerate the facts to be established; and the words "without his fault" being used to show the manner of the loss or of the fire occurring, do not deal with an independent fact. And, with what had been said before in the instructions, we think the jury could not have failed to know that the fire must have been without the fault of the plaintiff. Such a fact would almost naturally be understood. No clearer instruction was asked, and there was no error.

III. A provision of the policy required that, if there was a loss under the policy, the plaintiff should submit to an examination under oath, which he did; and it is claimed that he made statements that were false, and that such statements avoided the policy.

The court instructed that, for such statements to render the policy void, they must have been made intentionally, knowing them to be false; that there must have been an intent to defraud. This is thought to be an error. It is said the company had the right to the truth about every matter that was material. It is certainly true that the company had a right to the truth, as far as the assured was able to give it; but there is no provision of the contract that subjects him to such a forfeiture as is claimed for an unintentional misstatement of fact. See *Erb v. Insurance Co.*, 98 Iowa, 606 (67 N. W. Rep. 583). The following authorities, cited by appellee, support the rule adopted by the court: *Claflin v. Insurance Co.*, 110 U. S. 81 (3 Sup. Ct. Rep. 507); *Insurance Co. v. Summerfield* (Miss.) 13 South. Rep. 253; *Insurance Co. v. Starr* (Tex. Sup.) 12 S. W. Rep. 45; *Insurance Co. v. Vaughan* (Va.) 14 S. E. Rep. 754; Wood, *Fire Ins.* (Ed. 1878), section 429. It is thought that *Siltz v. Insurance Co.*, 71 Iowa, 710 (29 N. W. Rep. 605), aids appellant's view, but it does not. The policy in that case guarded the company against frauds or attempts to defraud, and importance seems to be attached to the mere attempt at fraud. But the meaning of fraud is lost sight of. It is an *intentional* wrong, and not a mere mistake. We are not cited to an authority holding to the rule of appellant's contention.

Appellant refers in argument to some particulars of misstatement in the examination. Plaintiff stated that in the house were some small oil paintings, costing six dollars, purchased of Mrs. Wilson. Mrs. Wilson states: "I never, what you would call sold him, pictures at any time. I gave his wife eleven painting lessons,—if I remember right, at fifty cents a lesson,—and she painted some on oil paintings, and I painted

the rest of the pictures, and Mrs. Huston got the pictures. That is all the deal I ever had with D. B. Huston or his wife about oil paintings." There are other statements, made by the plaintiff on the examination, that are contradicted by other evidence, but nothing to warrant us in saying that the jury did not properly determine the facts as to the statements being fraudulent under the instructions. It does not appear, that the misstatement was intentional, if it

4 was such; nor does it seem that the fact in dispute is material. Much importance is attached to the fact that plaintiff stated on his examination that he bought a square piano for five hundred dollars of Vose & Sons, when by other evidence it is made to appear that the piano was given to his wife by her father. There is no conflict as to the piano being there, or the loss; but it is as to whether he or his wife owned it, and who bought it. There could be no fraud on defendant as to either fact. The policy covered, by its terms, household furniture, musical instruments, etc., *in a certain house*, and was as applicable to such an article belonging to the wife as to him. We do not find in the policy a limitation as to ownership that would obviate the claim for such an article owned by the wife. The jury might well find, that in the statements there was no purpose to defraud, even if incorrect, as to certain particulars.

Appellant argues some fifteen assignments together, in which it is claimed that there was error

fixed the measure of recovery at the reasonable market value of the property. There is no error in the record, and the judgment is **AFFIRMED**.

FRED OPEL V. ANNA SHOUP, et al., Appellants.

100	407
102	171
100	407
121	349

Descent and Distribution: CONFLICT OF TREATY AND STATUTE. Under Constitution of the United States, article 6, providing that the constitution, laws made in pursuance thereof, and federal treaties with foreign countries, shall be the supreme law of the land, notwithstanding anything in the constitution or laws of a state, to the contrary, a federal treaty with a foreign country, conferring on its subjects, notwithstanding their alienage, a qualified right to take by inheritance lands in the United States, under the laws here controlling its descent, must prevail over a state law prohibiting aliens from taking lands by descent.

SAME: Federal power. A federal treaty with a foreign country, which, by conferring on subjects of that country a right, notwithstanding their alienage, to take by inheritance lands in the United States, according to the laws here controlling its descent, removes from them the disability imposed by a state statute prohibiting aliens from inheriting lands within its limits, - does not alter the laws of descent of the state so as to render it unconstitutional, as an infringement of the right of the state to control its internal policy.

Construction of Will. A will, after devising the testator's entire estate in trust to his executor, to be invested so as to produce an income, provided that the income should be paid to his wife so long as she remained a widow; that, if she re-married, one-half of his estate should be paid to her, and the other half to his sister, or if his sister was then dead, divided equally among his heirs at law by blood kinship. *Held*, that the sister, on the death of the wife without having re-married, was entitled to take only as an heir.

Action in equity to determine the interest of the several parties in lots 1, 2, and 3, block 51, in Iowa City, belonging to the estate of John C. Hormel, a resident of Iowa, who died at Iowa City, testate, April 13, 1892. All the defendants except the wife and children of F. C. Hormel, deceased, appeal from the decree rendered.—*Affirmed.*

Robinson & Patterson for Anna Shoup, appellant.

The court erred in holding that said Anna Shoup took nothing under said will, but was only entitled to one-tenth of said estate as heir of John C. Hormel, deceased.

The intent of the testator is the first great subject of inquiry.

Murphy v. Black, 44 Iowa, 177; 1 Redfield Wills, pages 434, 435, Rule 21; *Clarke v. Johnston*, 85 U. S. 18 Wall. 493, 21 L. Ed. 904; Schouler, Wills, section 466; 1 Redfield, Wills, 3d Ed. page 432, cl. 17.

In drafting the will, Mr. Hormel had the estate in his mind's eye, divided into two equal parts, one being his wife's portion, the "other half" being the portion to be given to Anna Shoup on division provided for in the will. In case of said sister's death, before division, then he calls it "the one-half my estate," meaning thereby his own part of the estate that had failed to have passed to the sister, by her death before division, which, in that event, was to go to his heirs by blood kinship.

The condition of re-marriage of Mrs. Hormel did not in the least affect Mrs. Shoup's interest, it only affected the interest of Mrs. Hormel in this, that in

such event, she was to lose the interest earned by half the estate, the payment of which was then to cease.

Remley & Ney for appellants *Schultze, et al.*

This will provides that the entire estate shall be placed in the hands of a trustee. It is not, and does not purport to be a disposition of only one-half of his estate, the other half of which he recognizes by law would go to his widow without a will, but it is a disposition of all the property of which he died seized.

Snyder v. Miller, 67 Iowa, 261; *Severson v. Severson*, 68 Iowa, 656.

The appellants are the heirs of John C. Hormel, and no heirs having been found under the rules of descent laid down in sections 3657-3661 of McClain's Code, inclusive, the property of the said Elizabeth Hormel, deceased, goes to the heirs of her deceased husband, under section 3662 of McClain's Code.

The treaty simply provides, when a citizen of one of the contracting parties holding property in the territory of the other contracting nation dies, and such property, by the law of the land, descends to the citizen or subject of the nation of which the decedent was a citizen, then such heir shall be allowed two years to withdraw the proceeds, and that no duty shall be imposed by reason of such withdrawal. In other words, the term "any person" relates to a citizen of one country holding property in the territory of another.

Frederickson v. Louisiana, 64 U. S. 23 Howard 445, 16 L. Ed. 577.

The interpretation of the treaty sought to be placed by the appellee, would make it possible for the President, with the approval of the Senate, to rob the states of one of their inherent powers as sovereign states.

A treaty cannot change the Constitution of the United States.

207½ lbs. *Papers Smoking Tobacco v. United States* ("The Cherokee Tobacco"), 78 U. S. 11 Wall, 616, 20 L. Ed. 227.

The regulation of descent is not a matter given to the United States government by the Constitution; hence, it is reserved to the states.

Watkins v. Holman, 41 U. S. 16 Pet. 63, 10 L. Ed. 888; *Wilcox v. Jackson*, *McConnel*, 38 U. S. 13 Pet. 498, 516, 10 L. Ed. 264, 273; *Kerr v. Moon*, 22 U. S. 9 Wheaton, 565, 570, 6 L. Ed. 161, 163; *United States v. Crosby*, 11 U. S. 7 Cranch, 115, 3 L. ed. 287; *Robinson v. Campbell*, 16 U. S. 3 Wheaton 212, 4 L. Ed. 372.

The descent and heirship of real property are governed by the laws of the country where it is located.
Story, Conf. L. sections 424, 428.

Elizabeth Hormel having died, her mother, who was a non-resident alien, could not, under the provisions of section 1, inherit property from the deceased. One could not inherit land through an alien ancestor.

Furenes v. Mickelson, 86 Iowa, 508; *Bennett v. Hibbert*, 88 Iowa, 154; *Re Gill*, 79 Iowa, 296, 9 L. R. A. 126.

Treaties made under authority of the United States are the supreme law of the land (Article 6, Constitution of the United States), but a treaty not authorized by the Constitution is not the supreme law.

Article 1 of the treaty between the United States of America and Bavaria, is as follows: "Every kind of *droit d'aubaine*, *droit d're traite*, and *droit detraction*, or taxes on emigration, is hereby and shall forever remain abolished between the two contracting parties, their citizens and subjects respectively."

Article 2. "Where on the death of any person holding real property within the territory of one

party, such real property would, by the law of the land, descend to a citizen, or subject, of the other were he not disqualified by alienage, such citizen, or subject, shall be allowed a term of two years to sell the same, which may be reasonably prolonged according to circumstances, and withdraw the proceeds thereof without molestation, and exempt from all duties of detraction."

Article 3 provides that the citizen, or subject, of each of the contracting parties shall have the power to dispose of their real and personal property within the states of either by testament, donation, or otherwise, etc.

Our contention is, that the term, "any person," in Article 2, relates to a citizen of one country holding property in the territory of the other. This construction is that adopted by the department of state. Opposite the section is the following note: "Death of citizens of one nation in territory of the other."

D'aubaine, in the French law, is a rule by which all property of the deceased foreigner, whether movable, or immovable, is confiscated to the state to the exclusion of his heirs, whether claiming *ab in testato*, or under a will of the deceased. Black's Law Dictionary and Bouvier's Law Dictionary.

Article 1 of the treaty abolishes the right to confiscate property, etc., but does not fix the time for removal, nor does it prohibit a duty upon removal, and for this purpose alone was the second section enacted.

The three rights claimed by sovereign states, referred to in article 1 of the treaty, related alone to cases where a foreigner died within the state. There was no application, and could be none, of the rights therein named which were formerly claimed by the state, except where a foreigner died having property within the territory of the state, which claimed the

right to escheat the property to the state. Hence, the terms become meaningless when applied to a citizen of the United States, and the property situated therein, of which he died seized. The term, *droit d'aubaine*, means the right to confiscate the property within the territory of a state or power, belonging to a citizen of some other state or power, upon the death of the owner thereof. This central idea runs through the whole treaty.

In construing a treaty with Wurtemberg, which is identical with the Bavarian treaty, the supreme court of the United States, in *Frederickson, et al., v. State of Louisiana*, 23 Howard, 445, holds that the treaty does not regulate the testamentary disposition of citizens or subjects of the contracting powers, with reference to property within the country or origin of their citizenship; the case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in contemplation of the contracting powers, and is not embraced in this article of the treaty.

It will not be contended that the federal government has had the power to prescribe rules of descent for the citizens of the state, granted to it. A treaty made outside the powers conferred by the constitution, is not the supreme law of the land.

A treaty cannot change the Constitution of the United States. *The Cherokee Tobacco Case*, 11 Wall. 616.

An act of congress may supersede a former treaty.

THE

"The state has an undoubted right to legislate as she may please in regard to the remedies to be prescribed in her courts, and to regulate the disposition of the property of her citizens by descent, devise or alienation."

Wilcox v. Jackson, 13 Peters, 498, on page 516.

Again, on page 517: "We hold the true principle to be this: That whenever the question in any court, state or federal, is whether the title to land which has once been the property of the United States has passed, that question must be resolved by the laws of the United States; but whenever, according to these laws, the title shall have passed, then the property, like other property in the state, is subject to state legislation."

It is an unquestionable principle of law that the title to and disposition of real estate must be exclusively subject to the laws of the country where it is situated.

Kerr v. Moon, 9 Wheaton, 565.

Robinson v. Campbell, 3 Wheaton, 212.

United States v. Crosby, 7 Cranch, 115.

Wunderle v. Wunderle, 33 N. E. Rep. 195, in construing article 6 of the constitution, states a rule too broad, and is not sustained by the authorities which it cites.

Chapter 85, of the acts of the Twenty-second Gen-
eral Assembly of Tennessee, "Non-resident

A party cannot inherit land through an alien ancestor.

Furenes v. Nickelson, 86 Iowa, 508.

But a non-resident alien can take by will in the manner and form prescribed in the second section of chapter 85 of the Acts of the Twenty-second General Assembly.

Bennett v. Hibbert, 88 Iowa, 154.

In re Gill, 79 Iowa, 296.

J. A. Edwards for appellee.

The treaties between the United States and the different German states (including Bavaria), were not abrogated by their absorption into the German empire, and Bavaria still retains its entity, and identity, as a constitutional monarchy.

See *Wunderle v. Wunderle*, 33 N. E. Rep. 195.

See *In re Thomas*, 12 Blatch, 370.

It is within the treaty making power of the United States to remove the disability of alienage, and to enable persons to come within the statutes of descent of the different states, and inherit real estate, who would otherwise be disabled from so doing by reason of such alienage.

See *People v. Gerke & Clarke*, 5 Cal. 381.

See *Chirac v. Chirac*, 2 Wheaton, 259.

See *Hughes v. Edwards*, 9 Wheaton, 489.

A treaty with a foreign nation, which stipulates that subjects of such other nation may inherit real estate in this country, notwithstanding such alienage, suspends the laws of the different states so far as they purport to prevent such foreign subjects, on account of their alienage, from taking property by inheritance in the United States from citizens therein.

See *Godfrey v. Riggs*, 133 U. S. 258.

See *Wunderle v. Wunderle*, 33 N. E. Rep. 195.

GIVEN, J.—The last will and testament of John C. Hormel, deceased, provides as follows: "After my death, I desire that my estate, of whatever name and nature, be placed in the hands of a trustee, hereinafter named, to be by him invested so as to be productive of good interest, and in such manner as he may deem safe.

(2) I desire that the entire proceeds of said investment of my estate shall be paid at the end of each year to my wife, Elizabeth Hormel, so long as she shall remain my widow. If she marries again, then I desire that one-half of my estate be paid to her for her own free use and behoof, and the other half to be paid to my sister Anna Shoup, now living at Springfield, Illinois. In case my sister dies before the division of my estate is made as above provided, then I desire that the one-half of my estate be divided equally between my heirs at law by blood kinship."

A. A. Ball was appointed in the will as trustee and sole executor, and qualified as such.

The first contention is whether the defendant (appellant) Anna Shoup, is entitled to one-half of the property in question under said will.

John C. Hormel died April 13, 1892, without issue, leaving his wife, Elizabeth Hormel, and his sister Anna Shoup, surviving him; his parents, brothers, and sister, other than Anna, having departed this life prior to his death. Elizabeth Hormel died, intestate, November 29, 1892, not having married again. The rules for construing wills are so well understood, and of such frequent application that we need not refer to the many authorities cited; it is sufficient that we refer to *Kiene v. Gmehle*, 85 Iowa, 313 (52 N. W. Rep. 232).

In that case this court quoted, with approval, from cases cited, as follows: "The cardinal principle to be kept in view is that the intent of the testator,

if possible, is to be ascertained in the construction of wills. Courts always look upon the intent of the testator as the polar star to direct them in construction of wills.

The object of all rules of interpretation is to discover the intent, and this should be gathered from the whole instrument.

It may, however, be trusted as a safe rule to follow in all cases of construction of contracts, conveyances, or wills, that the intent of the parties, manifested by the reading of the whole instrument together, in the light of attending circumstances, must control the meaning." It is said in that case: "The intent of the testator, as shown by the will construed according to established rules, must control. Courts may not give effect to any other result than that intended. To do so would be to make the will for the testator. Neither may they defeat the intention when it is lawful."

Guided by these rules, we turn to the will to ascertain the intent of the testator in respect of the devise to Anna Shoup.

It is therein plainly written, in unmistakable terms, that the proceeds of the estate are to be paid to Elizabeth Hormel "so long as she shall remain my widow," and, in terms quite as definite, that, if she marries again, one-half shall be paid to her for her own free use, "and the other half to be paid to my sister, Anna Shoup."

The sole contingency upon which Anna Shoup was to be paid one-half, was the re-marriage of Elizabeth Hormel. Elizabeth Hormel did not marry again, and therefore the contingency upon which alone Anna Shoup was to have one-half of the estate never

should go to Anna Shoup on the death of the widow without re-marriage, as well as upon her marrying again; but the will does not so provide. The testator had a right to rest it upon the condition that he did, and, having done so, it is not for us to inquire as to his reasons. We think the learned district judge held properly that Anna Shoup is not entitled to take one-half of the estate under the will, and that she is only entitled to share therein as an heir of John C. Hormel, deceased.

II. Elizabeth Hormel was a citizen of the United States, and a resident of the state of Iowa, at the time of her death. In the few months that transpired between the death of her husband and her own death, she had not elected whether she would take under his will or under the statute; but it is not questioned but that she died seized of an undivided half of the real estate in controversy, and that her interest passed to her next of kin legally qualified to inherit the same, immediately upon her death. She died without issue, leaving as her only parent surviving her, her mother, Elizabeth Opel, a non-resident alien, residing in Bavaria, Germany. Elizabeth Opel died, intestate, in Bavaria, on May 12, 1894, leaving, as her next kin, surviving her, her children, John Opel, Sr., and Barbara Degleman, both non-resident aliens, and the plaintiff, Fred Opel, a citizen of the United States, and resident of the state of Iowa.

The plaintiff, Fred Opel, contends that he is entitled to inherit the undivided one-half of said real estate from his sister, Elizabeth Hormel, either solely or with his said brother and sister.

It is contended on behalf of the heirs of John C. Hormel, that neither the plaintiff nor the other children of Elizabeth Opel are entitled to so inherit, and that, therefore, no heirs of Elizabeth Hormel being found legally entitled to inherit said property, it goes

to the heirs of her deceased husband, John C. Hormel, under section 2458 of the Code of Iowa.

Leaving out of consideration the fact of alienage, it would not be questioned but that, upon her death, the estate of Mrs. Hormel vested in her mother, and, upon her death, in her children, Fred Opel, John Opel, Sr., and Barbara Degleman. Chapter 85, Acts Twenty-second General Assembly, approved April 9, 1888, provides as follows:

"Section 1. Non-resident aliens * * * are hereby prohibited from acquiring title to, or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise, only as hereinafter provided."

An exception is thereafter provided in favor of "the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof;" but this exception does not apply to this case, as Elizabeth Hormel was not an alien. Section 2 of said chapter provides as follows:

"Sec. 2. Any non-resident alien may acquire and hold real property to the extent of three hundred and twenty (320) acres, or city property to the amount of ten thousand dollars in value, providing that within five years from the date of purchase of said property, the same is placed in the actual possession of a relative of such purchaser, the occupant being related to such owner within the third degree of kindred, or the husband or wife of such relative, and further provided, that such occupant become a naturalized citizen within

Rep. 287). Section 7 of said chapter provides that the act shall not apply to aliens who are residents of the state of Iowa. It is certainly clear that Mrs. Opel was disqualified from acquiring title to, or taking or holding this real estate by descent, under the prohibitions of the first section, and that she is not within either of the exceptions made to that prohibition.

In *Furenes v. Mickelson*, 86 Iowa, 508 (53 N. W. Rep. 416), this court held that a naturalized citizen, resident of this state, cannot inherit through a father who is a non-resident alien, the lands of a great-uncle who was a naturalized citizen, "on the ground that a line of inheritance cannot be traced through non-resident aliens."

If nothing further appeared, the conclusion would follow from what we have said, that the estate did not pass to Elizabeth Opel, and consequently, did not pass to her children.

III. On January 21, 1845, there was concluded and adopted between the United States of America and the King of Bavaria, Germany, a treaty, articles 1, 2, and 3 of which are as follows:

"Article 1. Every kind of *droit d'aubaine*, *droit de retraite*, and *droit de detraction* or tax on emigration, is hereby and shall remain, abolished between the two contracting parties, their states, citizens, and subjects, respectively.

"Art. 2. Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof, without molestation, and exempt from all duties of detraction.

"Art. 3. The citizens or subjects of each of the contracting parties shall have power to dispose of their (real and) personal property within the states of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said (real and) personal property, and may take possession thereof, either by themselves or by others acting for them; and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

The other articles provide for the care of the property in the absence of the heirs, the mode of deciding disputes, that the treaty shall not derogate from the force of laws of Bavaria to prevent the emigration of the king's subjects, and that the treaty is made subject to the approval of the two governments,

This treaty abolishes, as between these governments and the subjects thereof, "every kind of *droit d'aubaine*, *droit de retraite*, and *droit de detraction* or tax on emigration."

Black's Law Dictionary defines "*droit*" as equivalent to the English word "right"; and "*droit d'aubaine*" as, "in French law, a rule by which all the property of a deceased foreigner, whether movable, or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato* or under a will of the deceased." It is this provision of

The fault of this argument is in assuming that the protection is for the dead, and that the property remains in the deceased. It is conceded that this property vested in some living person immediately upon the death of Mrs. Hormel. If, under the common law, that person was disqualified by alienage from inheriting it, then this treaty applies and removes that disqualification.

In the absence of this treaty, Mrs. Opel was disqualified, by alienage, from inheriting this property; but by it the disqualification was removed, and therefore the property descended to her. Our inquiry, then, is as to property in Iowa belonging to a resident and subject of Bavaria.

Appellants cite *Frederickson v. Louisiana*, 23 Howard, 445. "Fink was a naturalized citizen of the United States at the time of his death, and residing in the city of New Orleans; also, that the legatees resided in the kingdom of Wurtemberg, and are subjects of the King of Wurtemberg." We had a treaty with that kingdom similar to that under consideration. Louisiana had a statute providing that "each and every person, not being domiciled in this state, and not being a citizen of any other state or territory in the Union, who shall be entitled, whether as heirs, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such person shall have died in this state, or elsewhere, shall pay a tax of ten per cent. on all sums, or on the value of all property which he may have actually received from said succession, or so much thereof as is situated in this state, after deducting all debts due by the succession." Rev. St. 1876, section 3683. The claim of the state to this tax was

personal property, and is different in its language from the second, which is identical with the second in this. The court held that the act does not make any discrimination between citizens of the state and aliens in the same circumstances, and sustained the tax as valid. Appellants quote from the opinion as follows: "But we concur with the supreme court of Louisiana in the opinion that the treaty does not regulate testamentary disposition of citizens or subjects of the contracting powers with reference to property within the country of their origin or citizenship. The cause of the treaty was that the citizens and subjects of each of the contracting powers were or might be subject to onerous taxes upon property possessed by them within the states of the other by reason of their alienage, and it is, perhaps, to enable such citizens to dispose of their property, paying such duty only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in contemplation of the contracting powers, and is not embraced in this article of the treaty." This view of that treaty is applicable to the one before us, but we fail to see wherein it supports the claim that the facts of this case do not bring it within the provisions of this treaty.

IV. Appellants cite authorities to the effect that the states alone have the right to regulate, by legislation, descents and conveyances of real estate within their borders; and from this it is argued that the federal government has no power, "by treaty, to interfere with the right of the state in regard to the descent of property upon the death of its citizens"; that
4 treaties made without authority are not valid; that this treaty is in conflict with the laws of Iowa, and is, therefore, of no force or effect. It may

be conceded that the states alone have such power; that they alone may declare to what kindred the estate of persons dying intestate shall descend. It must also be conceded that the federal government alone has power to treat with other governments as to rights of the citizens of each within the territory of the other. This treaty does not attempt to regulate descents of real property in Iowa. It does not declare that, when a son or daughter dies without issue, the estate shall go to the parents. It is left to the state, and Iowa has so provided. This treaty simply declares that, if that parent is disqualified by alienage, as to the citizens of these two governments, this disqualification is removed. In Article 6 of the Constitution of the United States, it is provided that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution, or the laws of any state, to the contrary notwithstanding." Many cases may be found wherein the courts have enforced treaty stipulations, similar to this, in favor of foreign claimants; but the case of *People v. Gerke*, 5 Cal. 381, is the first we find wherein the power of the federal government in this respect was questioned. In that case, Deck, a citizen of Prussia, died in San Francisco, leaving undisposed of a large amount of real property in that state. Article 14 of our treaty with Prussia is the same as Article 3 of this treaty. The attorney general, on behalf of the state, denied the power of the federal government to make such a provision by treaty, and argued, as is done in this case, that to exercise such power would permit the federal government to control the internal policy of the states, and in cases like this to alter materially the statutes of descent.

The court, after an able consideration of the subject, concludes as follows: "I can see no danger which can result from yielding to the federal government the full extent of powers which it may claim from the plain language, intent, and meaning of the grant under consideration. Upon some subjects the policy of a state government, as shown by her legislation, is dependent upon the policy of foreign governments, and would be readily changed upon the principle of mutual concession. This can only be effected by the action of that branch of the state sovereignty known as the 'General Government;' and, when effected, the state policy must give way to that adopted by the governmental agent of her foreign relations." The reasoning and conclusion of the opinion are strongly emphasized by what is added by Justice Ryan. While the question of the power of the federal government in this respect was not directly passed upon in the following cases, they show that the courts have uniformly enforced such treaties, without doubting the power of the federal government to make them: *Chirac v. Chirac*, 2 Wheaton, 259; *Hauenstein v. Lynham*, 100 U. S. 483; *Geofroy v. Riggs*, 133 U. S. 258 (10 Sup. Ct. Rep. 295); *Fairfax v. Hunter*, 7 Cranch, 603; *Carnel v. Banks*, 10 Wheaton, 189; *Hughes v. Edwards*, 9 Wheaton, 489. In the recent case of *Wunderle v. Wunderle*, 144 Ill. 40 (33 N. E. Rep. 195), the subject of descents and alienage is considered at length, and with marked care and ability, as affected by the common law, and by statutes of the states and by treaties with the United States. In considering the effect of conflict between the statute of the state and a treaty with the United States, the court, after citing article 6 of the federal constitution, says: "In con-

by the treaty-making power of the United States, and that a treaty will control or suspend the statutes of the individual states whenever it differs from them. Hence, if the citizen or subject of a foreign government is disqualified under the laws of a state from taking, holding, or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold, or transfer real property." If it may be said that chapter 85 of the Acts of the Twenty-second General Assembly is in conflict with said treaty of January 21, 1845, reason and the authorities support the conclusion that the treaty must control.

It follows from the conclusions we have reached that an undivided one-half of the property in question vested in Mrs. Opel upon the death of her daughter, and upon her death it passed to her children, subject to the conditions imposed by said treaty, and that the other undivided one-half passed to the heirs of John C. Hormel, deceased. The decree of the district court being in harmony with these conclusions, it is **AFFIRMED.**

**DIETRICH & CAPELL V. STEBBINS BROTHERS, Appel-
lants.**

Construction of Contract: DECLARATIONS OF AGENT. Where the correspondence constituting a contract for the purchase of restaurant fixtures, including a back case and counter, with show cases and drip board, specified the style of the back case, but did not specify the style or material of the other fixtures, or show that they were to be considered as a part of the back case, evidence of the declarations made by the purchaser to plaintiff's manufacturing foreman as to the style and material of the show case, counter and drip board, was admissible, though such foreman had no authority to make such a contract for the sale of such fixtures, where plaintiff made his offer on memoranda made by the foreman.

SAME. While, ordinarily, one who offers to manufacture goods for another at a specified price without specifying the quality, will not be bound to furnish goods of a quality which his unauthorized agent led the other party to expect would be furnished, he is bound to do so, where the agent tells him what has occurred and he is led thereby to make the offer.

Appeal from Van Buren District Court.—HON. M. A.
ROBERTS, Judge.

SATURDAY, DECEMBER 12, 1896.

ACTION at law to recover the contract price of certain furniture manufactured and delivered to the defendants. Defense, that the furniture did not com-

DEEMER, J.—Plaintiffs are manufacturers of furniture and office fixtures, doing business in the city of Ottumwa. Some time during the fall of the year 1894, one T. A. Stebbins, a member of the defendant firm, which is engaged in the restaurant business at the town of Bonaparte, went to Ottumwa for the purpose of buying a back case, counter, drip boards, etc., with which to fit up their place of business. He proceeded to plaintiffs' office, and there found one Snook, who was foreman in plaintiffs' factory, but who, it appears, had no authority to make contracts with reference to any goods which had to be specially manufactured. Stebbins told Snook what he wanted, and together they visited different places in the city to inspect the character of plaintiffs' work, one of these being what is known as the "Ballingall Billiard Hall Annex." Snook made a memorandum of Stebbins' wants, which he afterwards submitted to Mr. Dietrich, of the plaintiff firm, who, it seems, had charge of the matter of making estimates for such work as the defendants wanted. At the time he submitted the memorandum to Dietrich, Snook informed him that he had taken Stebbins to various places where the plaintiffs had furniture which had been manufactured by them.

Stebbins returned to his home, and thereafter plaintiffs wrote him the following letter: "Ottumwa, Iowa, Sept. 20th, 1894. Messrs. Stebbins Bros., Bonaparte, Iowa—Gentlemen: In reply to your request when you were at our place, will give you the following estimate: 1 back case, similar to the one you saw in the Ballingall, 16 feet long, made of pine, with hard oil finish, with mirror about 30 inches by 100 inches, plain; 1 counter, 16 feet long, and about 30 inches wide and 50 high, pine, with oak top, same finish; 1 drip board for same, 9 feet long, with zinc top, and two tanks, 12 inches by 9 inches, and faucets; 1 counter,

for show case, 18 feet long, about 26 inches wide, and 26 inches high, with top open, except 4 feet on one end; 1 counter for same, 14 feet, same dimension as other. We can furnish you the above, all in good shape, f. o. b. Ottumwa, for the sum of two hundred and fifty dollars (\$250.00). If top of drip board be of copper, add \$5.00. Hoping to receive your order for the above, we remain, yours, truly, [Signed] Dietrich & Capell." On the same day defendants wrote plaintiffs the following:

"Bonaparte, Iowa, Sept. 20th, 1894. Capell & Dietrich, Ottumwa, Iowa—Gentlemen: We expected to hear from you to-day, with prices of counters, etc. Other bids are all in. We bought to-day marble slab, 99 inches, for butcher counter. Please make us price on counter to fit it, and let us hear from you at once. The lunch counter wants to be 45 inches high from top to bottom. Yours, truly, [Signed] Stebbins Bros."

In response to plaintiff's first letter, defendants wrote the following: "Bonaparte, Iowa, Sept. 22d, 1894. Dietrich & Capell, Ottumwa, Iowa—Gentlemen: Yours 20th at hand. We are quite surprised at your price. We did not expect it to be near so high, besides, the lunch counter was to be 20 feet long, not 16. We think 50 inches is too high, 45 inches from the floor to the surface on top is just right. Now, we will not buy the stuff only delivered in our building and set up. We wrote you on the 20th what our butcher counter would be. We have bought the slab, which is just 99 inches long. We want counter to fit it. We will make you this offer, which you must accept or decline at once, for the stuff described in your letter 20th, except the lunch counter is to be 20 feet as talked, and this butcher counter all delivered here and set up. We will give you \$250 spot cash when the work is completed. Yours, truly, Stebbins Bros."

To which the plaintiffs replied as follows:

"Ottumwa, Iowa, September 24, 1894. Stebbins Bros., Bonaparte, Iowa—Gentlemen: Yours of 22d just at hand, and in reply say that we are sorry to say that we cannot accept your offer for the work as we have given you estimate on, but will make you another offer. We will make you the butcher counter and set the whole job up in your store for (\$275) two hundred and seventy-five dollars. We can make you the job, by making it a little cheaper, and perhaps it might suit you as well, for \$250; but we would have to cheapen it up just that much. This is reducing the price on the work some, as it will cost more than the \$25 to make the one counter and set the job up. Hoping this may be satisfactory, and that we may receive your order for the above, we are, yours, respectfully, Dietrich & Capell."

Thereupon the defendants wrote the following:

"Bonaparte, Iowa, Sept. 25th, 1894. Dietrich & Capell, Ottumwa, Iowa—Gentlemen: Yours 24th at hand. We will accept your offer, and want the work at earliest possible moment. Don't make mistake in length of lunch counter. Yours truly, Stebbins Bros."

This is all the correspondence which passed between the parties relating to the contract, except some letters with reference to certain changes, and the time in which the work should be completed.

The defendants, in their answer, alleged that the work was to have been of the same quality and material as that in Opera House drug store, and the

was rejected by the court, and the defendants assign error.

In support of the court's ruling, it is insisted that it was not shown that Snook had authority to make a contract for the sale of the goods, nor that any statements made by him would be binding upon the plaintiffs. It is further claimed that the contract between the parties was reduced to writing, and that this writing, consisting of the letters above set out, is conclusive on the question as to what the contract really was. This last proposition is certainly correct, and if the whole contract is embodied in these matters, then parol evidence is inadmissible to vary or change it. By reference to these letters, it will be seen that they do specify the style, dimensions, and finish of the back case, but do not give the style of the counter, nor the style nor finish nor material of the drip-board, show case, and counter, unless it can be said that each and all of these were a necessary part of, and were included in, the order for the back case. Parol evidence was necessary, however, to establish this last proposition, and this became a question of fact for the jury.

It cannot be said, as a matter of law, that the whole contract was embodied in the letters. It is manifest that, unless it be found, as a fact, that the counters, drip boards, and show-case counters were part and parcel of the back case, and necessary to make it complete, the style, finish, and material of these articles rested in parol, and the defendants should have been allowed to show the kind they received the offer upon. The only means they had of doing this was to show what they stated to Snook when they visited the factory.

It is insisted, however, that Snook was not the agent of plaintiffs for the making of contracts. This is probably true. But he was their agent for the

purpose of securing a description of the goods wanted, or, if he had no express authority for so doing, the plaintiffs recognized him as such in this case; for they acted upon the information received by him in sending the offer to the defendants, and must be charged with his knowledge, the same as if he was expressly authorized. These are elementary principles, and require no citation of authority in their support.

It is true that the evidence referred to was admitted, but the court withheld his ruling, and he afterwards struck it out because of Snook's want of authority. The jury were also instructed that they could not consider any conversations between Stebbins and Snook with reference to the Arcade or Opera House drug store fixtures, because Snook had no authority in the premises. This took the evidence referred to out of the case. It is claimed, however, that these rulings were without prejudice, for the reason that Stebbins admitted that he told Snook he did not want anything as expensive as at the Arcade. We find, in examining the record, however, that this related to the back case, and not to the other articles purchased.

In the sixth instruction the court limited the jury to a consideration of those statements made by Stebbins to Snook, which were communicated to plaintiffs before the twentieth of September, 1894; and in the eighth struck out the evidence of Stebbins as to his statements to Snook, for the reason they were not communicated to the plaintiffs. For the reasons pointed out, these instructions were erroneous.

Other instructions are complained of, and defendants also contend that the court erred in not giving certain instructions asked by them.

What we have said sufficiently indicates our views regarding these matters, and we need not more specifically refer to them. Some other rulings on the

admission and rejection of evidence are complained of, but, as they are not likely to arise on another trial, we will not consider them. Our conclusions find support in the following cases: *St. Louis Refrigerator & Wooden-Gutter Co. v. Vinton Washing Machine Co.*, 79 Iowa, 240 (44 N. W. Rep. 370); *Farrar v. Peterson*, 52 Iowa, 420 (3 N. W. Rep. 457); *Eadie v. Ashbaugh*, 44 Iowa, 520; *Jackson v. Mott*, 76 Iowa, 263 (41 N. W. Rep. 12). For the errors pointed out, the judgment of the district court is REVERSED.

R. J. OSBORN v. EDMUND JENKINSON, Appellant.

Negligence: JURY QUESTION. As plaintiff was driving across F. street, defendant's horse driven to a buggy on F. street, collided with plaintiff's buggy. A city ordinance provided that no person should drive on any street faster than six miles per hour. Defendant and two other persons driving single horses, were nearly abreast, racing their horses. Defendant and his wife, who was with him, testified that he was not racing, but, while driving at an ordinary gait, the other two horses came up behind him, frightened his horse, and he could not hold him in; and that when he came to plaintiff's buggy he jumped or fell into the buggy, and crushed it. Two witnesses testified that defendant's horse did not jump, and one of them said he came "on the straight trot." Defendant's was a fast horse, and he and the owner of other fast horses were accustomed to speed them on F. street. *Held*, that whether the collision was a mere accident, and not the result of defendant's negligence, was a question for the jury.

CONTRIBUTORY NEGLIGENCE: Jury question. It appeared that plaintiff was a dairyman; that he had stopped at a store on the corner; that he had gotten into his buggy and started across the street, driving in a proper manner; that one or more persons called out to him to look out for the race; and that he had no time to get out of the way. *Held*, that whether he was guilty of contributory negligence, was a question for the jury.

Damages. A verdict for one thousand dollars for personal injuries will not be set aside as excessive, where they are serious, and the evidence tends to show that they are permanent.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

SATURDAY, DECEMBER 12, 1896.

ACTION at law to recover damages for injuries to the person of the plaintiff, and to a buggy or spring wagon, which injuries are alleged to have been caused by the unlawful and negligent acts of the defendant. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendant appeals.—*Affirmed.*

M. B. Davis for appellant.

Wright, Hubbard & Bevington for appellee.

ROTHROCK, C. J.—The act of the defendant of which the plaintiff complains occurred at the intersection of Fourth and Steuben streets, in Sioux City.

The plaintiff was driving across Fourth street, with a single horse, and a spring wagon. The defendant was driving a single horse and phaeton along Fourth street, and at the intersection of the two streets, the defendant's horse came in collision with the buggy of plaintiff with great force, and nearly destroyed it. Three wheels were broken, one axle was sprung, the sides of the box were crushed, and, in short, it was a wreck. The plaintiff was thrown out of the buggy and seriously injured. He was driving slowly when the collision occurred, and the defendant was driving at a reckless and unlawful rate of speed, in violation of an ordinance of the city which provides that no person shall drive on any street faster than a rate of six miles per hour, or drive "in such a manner as to come in collision with or strike any other person or object." It is undisputed

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that the defendant and two other persons, who were driving single horses, were nearly abreast, and that they were going at the rate of about a mile in three minutes, or twenty miles an hour. And there is no dispute that the two other drivers were racing or speeding their horses on Fourth street. The collision occurred in the evening, after it became dark, and the street lights were burning. The defendant and his wife, who was with him, testified as witnesses on the trial, that he was not racing his horse, but that, while driving at an "ordinary road gait," the other two horses came up behind him, and frightened his horse, and made him jump, and that he could not hold him in; and that when he came to plaintiff's buggy, in his jumping he jumped or fell into the buggy, and crushed it down. There is no question that if the defendant was engaged, with the other drivers, in racing or speeding their horses, he was guilty of the most culpable and criminal negligence. It is contended by counsel for defendant that the collision was a mere accident; that the defendant is not chargeable with negligence, because his horse was running away, and he could not control him. That was a fair question for the jury to determine. Two witnesses testified that the defendant's horse did not jump, one of them stated that the horse came "on a straight trot." And the defendant and his wife were contradicted by other witnesses as to facts attending the collision. The defendant's horse was a fast animal. He was in the habit of speeding him on Fourth street. He testified that he had driven him in less than three minutes to

II. It is said that the plaintiff, by his negligence, contributed to the injury. It appears to us this question was fairly submitted to the jury, and that the
2 court rightly held that there was evidence sufficient to sustain the verdict, so far as this question was involved.

We will not set out the evidence as to the care exercised by the plaintiff in driving across the street which the defendant and others were using as a race track, and on which, the jury were warranted in finding from the evidence, they were driving at the rate of about twenty miles an hour. The plaintiff was engaged as a dairy man, and had his milk cans in his vehicle. He stopped on the corner of Fourth and Steuben streets, bought some groceries, and watered his horse at a public watering trough, got into his buggy, and started across the street, driving in a proper manner. He was not looking for a horse race, but it came upon him without his fault. One or more persons called aloud to him to look out for the race, but it was too late. He had no time to get out of the way.

III. The verdict of the jury was for one thousand dollars. It is thought to be excessive.

We think otherwise. The plaintiff was seriously injured, and the evidence tends strongly to show that the injuries were permanent. We discover no
3 reversible error, and the judgment of the district court is **AFFIRMED**.

MARY J. BEEZLEY, Appellant, v. THE DES MOINES LIFE
ASSOCIATION.

Life Insurance: TAKING NOTE FOR PREMIUM: *Forfeiture.* A policy provided for payments coming due in May, and quarterly thereafter, and that failure to pay, upon notice, should work a forfeiture. A note was taken for the first three installments, and it stipulated that they should come due on May *nineteenth*, and quarterly thereafter, and that a failure to pay an installment should render the whole note due. Notice was given, demanding payment, as fixed by the policy, but no payment was made at either the time fixed by the policy or note. *Held*, the taking of the note did not limit the insurer to sue on the note in case premium installments were not paid, and a forfeiture may be declared under the policy, if payments are not made as provided by either note or policy.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

SATURDAY, DECEMBER 12, 1896.

ON February 19, 1893, the defendant executed and delivered to William Beezley, of Des Moines, Iowa, a policy of insurance upon his life, containing this provision: "And in case of the death of said party while in good standing to participate in the mortuary fund of the association to the amount of the guarantee note, less the balance, if any, due the company for the current year's insurance, said benefit to be paid at the home office, in Des Moines, Iowa, to Mary J. Beezley, if then living."

The premiums were payable quarterly, to-wit, ten dollars and eighty cents at the time the policy was issued, ten dollars and eighty cents in ninety days thereafter, and so on indefinitely. The policy made the second payment, due May 1, and the others quarterly thereafter; but a note was taken, by the terms

of which the second quarterly payment matured May nineteenth, after its date, and the next one ninety days thereafter. Ten dollars and eighty cents was paid in cash when the policy was issued. The next two quarterly payments were not paid.

The assured died on October 20, 1892. The policy contained the following provision: "That, if the quarterly payments or the payments on the guaranty note are not received by this association within sixty days from date of notice, then this policy shall be null and void and of no effect until all arrearages are paid, and health blanks signed and approved by the association." When the policy was executed, the assured executed to the defendant a note as follows:

"\$32.40. Des Moines, Iowa, February 19, 1892. For value received, I promise to pay to the Des Moines Life Association, in Des Moines, Iowa, thirty-two dollars and 40-100 cents, in three equal installments, the first installment to be due and payable in ninety days from date hereof, and each ninety days thereafter until the whole amount thereof is paid, without interest, if paid when due; otherwise, eight per cent. from maturity. This note is given for the first year's insurance, and in case a policy is not issued, to be void, and to be returned to the maker. In case any of the above installments are not paid when due, or within thirty days thereafter, then this note all falls due and payable at once. If suit is brought to collect this note, I agree to pay the costs of collecting, including attorney's fees, Wm. Beezley. P. O.: 102 E. 12th street, Des Moines, Iowa."

The policy also provided that a "printed or written notice, directed to the address of each member as they appear on the books of the association, and forwarded as aforesaid, shall be deemed a legal notice." The application of the assured directed that these notices should be mailed to M. J. Beezley, 102 East Twelfth

street, Des Moines, Iowa. April 1, 1892, a notice was thus mailed, to the effect that there would be due on May 1, 1892, on the policy of William Beezley, ten dollars and eighty cents, and that a failure to pay the same would "cause the forfeiture of your insurance."

May 2, 1892, a second notice was mailed, to the effect that the amount then past due on the policy was: fine, ten cents; quarterly payment, ten dollars and eighty cents,—total to pay, ten dollars and ninety cents; and "if this is not received at the office on or before June 1, 1892, your policy will promptly lapse."

This action is brought to recover on the policy. The defense is that there is no liability by reason of the non-payment of the quarterly amount of premium due May 19, 1892. The cause was tried to the court, and a judgment entered for the defendant, and against plaintiff, for costs. Plaintiff appeals.—*Affirmed.*

Barcroft & McCaughan for appellant.

Cummins & Wright for appellee.

KINNE, J.—I. The contentions of the appellant are: First, that inasmuch as a note was given for the premium, except for the first quarter, which was paid in cash, it follows that the association cannot take advantage of the provisions of the policy relating to a forfeiture, but are limited to a right of recovery on the note; second, it is claimed that the notices were

association within sixty days from date of notice, then this policy shall be null and void and of no effect."

We look to both the policy and the note to ascertain the contract of the parties, and what that contract is must be determined in view of the fact that these two instruments were contemporaneous. Bearing these facts in mind, we conclude that there was no purpose or intent that the taking of the note should waive the provisions of the policy touching the prompt payment of premiums. This is not a case where a note is taken for the entire premium, for the premium due at the time the policy was issued was paid in cash. Nor is it a case of extending time of payment of a premium, and accepting a note therefor. The question is: Did the taking of the note, under the circumstances disclosed, operate to prevent the association from relying upon the provisions of the policy requiring a prompt payment of the quarterly premiums?

It seems to us that it did not. Counsel for appellant relies upon *McAllister v. Insurance Co.*, 101 Mass., 558.

That case is, as it seems to us, rather an authority in support of the holding of the district court in this case. In the cited case the entire premium for a year was due and payable when the policy issued, and a like sum was to be paid at a fixed date every year. The policy contained the usual provisions for the forfeiture of the contract in case the premium was not paid. The company accepted a part of the payment in cash, and took notes for the remainder, one maturing in six months, and the others on demand after five years. The six-months note was not paid. The assured died. The court said:

"The defendants rely upon that provision of the policy which declares that, 'in case any premium due upon the policy shall not be paid at the day when payable, the policy shall thereupon become forfeited

and void,' except for a certain period, which had expired before the death of the assured in this case. But the court is of opinion that this clause, which is inserted for the benefit of the insurers, and to be construed most strongly against them, and which merely provides that the policy 'shall become forfeited and void' in case of a premium 'shall not be paid at the day when payable,' can only apply to a policy which has once taken effect, and to non-payment of a premium payable after that time, and cannot be held to refer to that premium which the policy contemplates, and required to be paid before the contract of insurance has any binding force."

The theory of that case is that as the company had waived the payment of the cash premium, which was due before the policy became binding, and had taken a note for it, it was estopped from claiming that, by reason of the non-payment of the premium, the policy had lapsed.

The reasoning of the court is that such a forfeiture clause in the policy can only be applied in case the policy has once taken effect, and to the non-payment of a premium payable after the policy has become a binding obligation.

In the case at bar the premium which must be paid before the policy went in force was paid in cash, and it is now sought to forfeit the policy on account of non-payment of premiums which thereafter became due, and for which the note was given. We have examined other cases cited, but they do not throw any light upon the question before us. Our conclusion is that a fair construction of both policy and note upholds the judgment of the district court.

II. As to the notices little need be said. They

Every end which could be accomplished by such notices was fully attained in this case. In the light of the evidence, there can be no serious objection to them. The judgment below is **AFFIRMED**.

HARRY A. NEWBURY, by His Next Friend, MAGGIE NEWBURY, v. THE GETCHEL & MARTIN LUMBER AND MANUFACTURING COMPANY, Appellant.

Master and Servant: INJURY TO MINOR EMPLOYE. In an action for injuries while performing work more hazardous than that for which a minor was employed, an instruction that defendant was liable if he put plaintiff at more hazardous work than that for which he was employed, without explaining the dangers incident thereto, - which instruction fails to limit the rule given it to those dangers of which the master knew, or had reason to believe plaintiff was ignorant, and which were not so obvious as that, with care, they could have been known to plaintiff, - is erroneous.

Fellow Servant. The mere fact that one employe had authority over others, does not make him a vice-principal, or superior, so as to charge the master with his negligence, in a matter which it was not the employe's duty to attend to.

SAME. The rule that an employer who furnishes a proper machine is not liable to a servant injured by it while using it for an improper purpose, does not apply in the case of an injury to an inexperienced employe who was using the machine in obedience to the directions of a superior whom it was his duty to obey.

DUTY TO MINOR EMPLOYEE. The rule of law, that the master is not liable to the employe for injuries, for improperly using, for one kind of work, for which proper machinery is furnished, machinery proper and sufficient for other work, has no application where such improper use is made by a minor employe, by order of a vice-principal who fails to explain that the machine is not the proper one for that kind of work.

Contributory Negligence: Minority. An instruction that plaintiff's minority could be considered only upon the question whether or not one of his age, experience and intelligence could, and did, know and appreciate the dangers incident to the work is proper

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10 determining whether or not he was guilty of contributory negligence, is not objectionable, as tending to hold defendant liable because plaintiff's minority made one under whose direction he was working, a vice-principal.

ORDER FROM SUPERIOR: *Mistake.* A master is not liable for injuries
8 to a servant caused by orders received from another, because the servant believed that he had been told to obey such orders, if such belief was not founded on fact.

DAMAGES: *Disfigurement.* In an action for personal injuries, disfigurement caused by the injury may be considered in assessing the damages.

DOCTOR BILLS. A minor living with his parents, cannot recover in
18 an action for personal injuries, the cost of medical services, at least, until he has paid the bill, as the parents are primarily liable therefor.

Amendment in Trial: HARMLESS ERROR Where a petition laid damages at five thousand dollars, and asked judgment for ten thousand dollars, errors in instructing that plaintiff could not recover exceeding ten thousand dollars, and in allowing the petition to be amended, after verdict by laying the damages at ten thousand dollars, were harmless, where the court subsequently reduced the verdict to five thousand dollars.

COMPELLING REMITTITUR. Under such circumstances, the trial court
14 may, in its discretion, require the plaintiff, in an action for personal injuries, to remit part of the verdict.

Instructions: APPLICABILITY: *Preponderance of evidence.* An
7 instruction is properly given on a theory which is supported by some evidence, although the preponderance of the evidence may be to the contrary.

Appeal from Polk District Court.—HON. W. A. SPURRIER, Judge.

SATURDAY, DECEMBER 12, 1896.

Guernsey & Bailey and *Barcroft & McCaughan* for appellant.

McVey & Cheshire for appellee.

DEEMER, J.—The defendant is a corporation engaged in the manufacture of sash, doors, blinds, and other woodwork. In the month of September, 1891, the plaintiff, Harry A. Newbury, a boy seventeen years of age, entered into the employ of the defendant, to work in and about its factory. He was put to work in a room known as the "Sash and Blind Department," over which one Page was foreman. He was engaged as a sort of a "roustabout," and one of his duties was to clean up the refuse pieces of wood that accumulated from time to time in the room where he worked, and to saw them into proper lengths for kindling. Plaintiff had done this cleaning and sawing on an average of about once every other day from September, 1891, to some time in the month of May, 1892, at which time the accident happened which will be hereafter referred to. In the department where the plaintiff worked, there were two circular saws,—one known as a cut-off and the other as a rip-saw. The cut-off saw was mounted on a table which was about three and one-half feet wide, six feet long, and two feet five inches high. The saw was about twenty inches from the end of the table at which the operator stood. It projected a few inches above the table, and the lumber which the operator desired to saw was placed upon a sliding carriage, which carriage was then pushed, with the lumber thereon, against the saw, by the operator, who would place his hands either behind the sliding carriage, or upon the lumber, and at safe distance to the left of the saw. Plaintiff was instructed in the use of the saw, and was directed to place both hands to the left of the saw while using it, in order to avoid

danger. The rip-saw was mounted upon a similar table, but it had no carriage. To the right of this saw was a movable gauge, which could be adjusted so as to rip the lumber accurately and smoothly to the required width. Designed as they were for special purposes, the saws were differently constructed. The teeth of the cut-off saw were smaller than in the rip-saw, and so set that they made a wider path through the wood than did the rip saw. There was the same difference between them that there is in the ordinary cross-cut and rip-saws; the difference being due, of course, to the fact that one is made to cut across the grain of the wood, and the other with it. Prior to the time of the accident, the plaintiff had used the cut-off saw in cutting the refuse matter, but he had not always followed the directions of his employer with reference to the proper place of putting his hands while using this machine. On the ——— day of May, 1892, plaintiff was directed by the foreman of the room to clean up the shop and saw up the refuse matter for kindling. This he proceeded to do, and while so engaged, the foreman left the

1 room. While engaged in his work, and during the absence of the foreman, one Garrity, who was employed about the mill, came to the plaintiff, and said he desired to use the cut-off saw, and plaintiff claims that Garrity ordered him to use the rip-saw for cutting up the kindling. Newbury claims that as he had never used the rip-saw for this purpose, he asked Garrity how to use it, and that Garrity, in response to this request, went to the saw, pushed back the gauge so it would not interfere with the lumber, started it, placed a handful of strips upon the table, and with one hand to the left and the other to the right of the saw, pushed them against it, and thus sawed the lumber into the required lengths for kindling. Plaintiff also claims that Garrity repeated this operation two or

three times and said to him (plaintiff) that that was the way to do it. Newbury says that he proceeded with his work as directed, and that (to quote plaintiff's own language): "I was standing at the north end of the table, looking south. The north end of the table is about three feet north of the saw. I was working on the rip-saw, cross-cutting, the same as Dick Garrity had told me to, and while doing that I picked up another handful of the strips, and went to push them into the saw, and pushed one handful through all right, and the next time I tried it they wedged on the saw. The rip-saw did not take out enough of the wood, but what it left there wedged on the sides of the saw, and it kind of made the saw jerk; and when the saw jerked it stopped it a little bit, and it caught a bigger stick, I suppose. I do not know exactly how it happened, but it was in that way. At the time the saw jerked there, my right hand was gripping the end of the lumber. The rip-saw was going up in the center of the table, and I had both hands on the wood, and ran it along like that, and my right hand was on the right hand end of the stick. In pushing it down that way, I was holding both ends, and they went down there and wedged, and it commenced to jerk; and I tried to push it on through, and it gave a heavy jerk, and threw my hand over on to the center of the saw, like that, and my hand was sawed off."

The negligence charged against the defendant is the order of Garrity to do the work with the rip saw, without informing him (plaintiff), who, by reason of his years, was without knowledge or experience
2 sufficient to comprehend the character of the work, of the dangers incident thereto, and in ordering plaintiff to do the work he did so, without informing him that it was more dangerous than when done with the cut-off saw. It will be noticed that

plaintiff does not claim that he was not furnished with proper tools with which to do his work. The cut-off saw is conceded to be a proper machine for the purpose, and it was the duty of the plaintiff to use it, in the absence of proper directions to use another. The negligence charged is that of Garrity, in ordering him to do the work with the rip-saw, without informing the plaintiff of the dangers incident to its use. But defendant cannot be held responsible for this, unless it is to be charged with the negligence of Garrity. Whether it should be so charged or not, is the principal question in the case, to determine. We must look to the evidence relating to Garrity's authority. It appears that Samuel Martin was, and is, the vice-president and general manager of the defendant corporation. Adolph Vieser was mill manager at the time of the accident, and O. A. Page was foreman of the department where plaintiff was employed. Page had charge of all the men in the room where plaintiff worked, and had authority to direct them as to their work. He had no authority to employ workmen, nor did he directly discharge them. It appears, however, that his requests for discharge were generally, if not universally, respected and acted upon. Martin employed the plaintiff, and directed him to go to Page's department, where he would be informed by Page as to his duties, and that he must obey Page. Garrity was a workman in the same room with plaintiff. He did machine work, principally, although he occasionally worked at the bench, on blinds. There is also testimony tending to show that early in the spring of 1892, while Page was absent from the factory, Garrity directed the men in the department in which plaintiff was engaged, and that at other times, when Page was out of the room, Garrity called plaintiff to his assistance, and directed him in his work, and that, when Page was not present, Garrity was in charge,

and gave directions to the men. It also appears that, for two or three days prior to the accident, Newbury was assisting Garrity, and working under his directions. In order to charge defendant with knowledge of the fact that plaintiff was working under the direction of Garrity, the following testimony was delivered by plaintiff. "Dick Garrity wanted me to do something there one day,—me and Law Martin, I think it was, that was working there at the same time,—and we were not going to do it; we were going to do something else; and Dick went and saw Page about it, and Page told us to go ahead; that Dick was an old hand there, and we should mind him; he would tell us what to do. From that time to the time of the injury, I was in the habit of obeying Richard Garrity, when he ordered me to do it." It also appears from the evidence that Martin was frequently present at the room where plaintiff worked; that he often noticed Garrity call Newbury to his assistance; and that he noticed Newbury was assisting, helping, and obeying Garrity; and that Garrity was the most experienced man in the department, except Page.

From this statement of the evidence, it will be seen that the controlling point in the case is the determination of the question as to whether the negligence of Garrity is to be attributed to the defendant.

3 If Garrity was a mere fellow servant with plaintiff, then defendant is not responsible for his negligence. If, on the other hand, he is and was a vice-principal, then defendant would be chargeable with his negligence. It is conceded by all parties that Martin and Vieser were vice-principals. Whether Page is to be so classed or not, is a more difficult question, but one not necessarily determinative of the case, for the real question is as to the authority of Garrity. Let it be conceded, for the purposes of the case, that Page was a vice-principal, and yet there is no liability,

for it is the negligence of Garrity, and not of Page, that is relied upon. What, then, was Garrity's authority? He had no power to employ or discharge men. The evidence tended to show that he had the right to call other employes to his assistance at all times, and that when Page was absent he was foreman of the shop, or of the department in which he worked. But

as such foreman he had no more authority than
4 usually devolves upon such a person. We have frequently held that the mere fact that one employe has authority over others, does not make him a vice-principal or superior, so as to charge the master with his negligence. *Peterson v. Mining Co.*, 50 Iowa, 673; *Foley v. Railway Co.*, 64 Iowa, 650 (21 N. W. Rep. 121); *Benn v. Null*, 65 Iowa, 407 (21 N. W. Rep. 700); *Baldwin v. Railroad Co.*, 68 Iowa, 37 (25 N. W. Rep. 918); *Hathaway v. Railway Co.*, 92 Iowa, 337 (60 N. W. Rep. 651). This rule, of course, relates to the negligence of the foreman, as such, and not to his want of care in doing those things which the master is obliged to perform by virtue of the relation existing between him and his servant. The rule is well settled, although not always correctly applied, that the liability of the master is made to depend upon the character of the act, in the performance of which the injury occurs, and not upon the rank of the employe who performs it. If it is one pertaining to a duty the master owes to his servants, he is responsible to them for the manner of its performance. But, if the act is one which pertains only to the duty of an operative, the employe performing it is a mere servant, and the master is not liable to a fellow servant for its improper performance. For instance, it is the duty of the master to make reasonable efforts to supply his employes

He is also required to exercise reasonable care in selecting and retaining a sufficient number of competent servants to properly carry on the business in which the servant is employed. It is another duty to make and publish such rules and regulations as are reasonably necessary to protect his employes against injury incident to the performance of their
5 duties. And it is further the duty of the master who knowingly employs youthful, or inexperienced servants, and subjects them to the control of others, to see that they are not employed in a more hazardous position than that for which they were employed, and to give them such warning of their danger as their youth and inexperience demand. These are duties of which the master cannot relieve himself by showing that he delegated their performance to another servant, who was at fault in performing them. In the performance of his duties the servant, agent, or employe stands in the place of the master, and becomes a vice-principal, and the master is responsible for his negligence. *Fink v. Ice Co.*, 84 Iowa, 321 (51 N. W. Rep. 155); *Haworth v. Manufacturing Co.*, 87 Iowa, 765 (51 N. W. Rep. 68). There is no pretense that this case falls within either of the first three exceptions to the general rule of non-liability for the negligence of fellow servants above stated. But it is claimed that it does come squarely within both exceptions stated in the last; that is to say, that the defendant, through its servant and agent, Garrity, ordered plaintiff into a more hazardous place to work than that for which he was employed

more hazardous than that for which he was engaged, or that Garrity failed to give him such warning of his danger as his youth and inexperience demanded, then the defendant would be responsible for Garrity's negligence, and plaintiff would be entitled to recover, provided he showed himself free from contributory negligence. Upon these propositions the court below gave the following instructions: "If you find, under the directions given you in the last preceding instruction, that the order or direction made by Garrity to the plaintiff, to use the rip-saw for the purpose it was being used at the time of the injury, was the order of the defendant, then you are further instructed that it is the duty of the master who knowingly employs a youthful servant, and subjects him to the control of another servant, to see that he is not employed in a more hazardous position than that for which he was employed, and to give him such warning of his danger as his youth or inexperience demands. And if you find that the use of the rip-saw, for the purpose and in the manner it was being used by the plaintiff at the time of the injury, was more hazardous than the use of a cross-cut saw, when used for the same purpose, or that the use of the rip-saw, in the manner and for the purpose it was being used at the time of the injury, was more hazardous and dangerous than when used for ripping lumber, then it was the duty of the defendant to explain, or have some competent person explain, to the plaintiff, the extra hazard or danger, if any, connected with the operation of said rip-saw when used in the manner and for the purpose it was being used by the plaintiff at the time of the injury. And if the defendant failed so to explain, or cause to be explained, to the plaintiff, such increased hazard or danger, if any, then the defendant, in so failing to do, will be deemed negligent, and liable to the plaintiff, if such order to use the rip-saw was the direct and

immediate cause of his injury, unless you find from the evidence that the plaintiff, at the time of the injury, had acquired knowledge from other sources, or by experience, of such extra hazard or danger in using said rip-saw in the manner and for the purpose it was used at the time of the injury." This instruction is criticised because, it is argued, it states the duty of the master too broadly. It is contended on the part of defendant that the duty of the master is to warn as to such dangers, and such only, as he has reason to believe, as an ordinarily prudent man, are not known to the servant. The instruction quoted relates to the duty of the master who orders his servant into a more hazardous position than that for which he was employed,

6 and fails to explain to him the dangers incident to his work. And, in so far as it makes this duty absolute, it seems to us that the instruction is wrong. The correct rule is as stated in the case of *Yeager v. Railway Co.*, 93 Iowa, 1 (61 N. W. Rep. 215), as follows: "The duty of the master to instruct and warn the servant only arises as to dangers which the master knows, or has reason to believe, the servant is ignorant of. It does not arise as to dangers known to the servant, or that are so open and obvious as that, by the exercise of care, he would know of them;" citing *Reynolds v. Railroad Co.* (Vt.) (24 Atl. Rep. 135); *Railway Co. v. Davis* (Ark.) (18 S. W. Rep. 629); *Dysinger v. Railway Co.* (Mich) (53 N. W. Rep. 825); *Levy v. Bigelow* (Ind. App.) (34 N. E. Rep. 128); *Railroad Co. v. Henderson* (Ind. Sup.) (33 N. E. Rep. 1021); *Merryman v. Railway Co.*, 85 Iowa, 634 (52 N. W. Rep. 545); *Downey v. Sawyer* (Mass.) (32 N. E. Rep. 654). In view of the evidence, it was highly important that the jury be correctly informed as to when, and under what circumstances, it was the duty of the master to warn his servant of the dangers incident to his work.

II. The eighth instruction is complained of. It is as follows: "Further, regarding the relation of fellow servants, you are instructed that the master may so act, and instruct his servants to obey one of their number in the performance of their work for the master, that in the performance of such duties so required by the master, the servant so authorized to transact the business of the master in the performance of such duties for the time, as to such servants who have received of the master a direction to obey, becomes the agent or representative of the master, in such sense that the master is liable for the negligence of the servant so invested with authority, while in the performance of the duties directed in the manner aforesaid by the master. And if you find from the evidence that Samuel Martin, the vice-president and general manager of the defendant corporation, told the plaintiff to obey Foreman Page, and that Page would tell him what to do, and that thereafter Page told the plaintiff, prior to the time of the injury, to obey the orders or commands of Richard Garrity, and that Martin knew that plaintiff was under the direction of Richard Garrity, and required to obey the orders and instructions of Garrity, and acquiesce therein, then the said Garrity, when he told the plaintiff to use the rip-saw in the manner and for the purpose it was being used at the time of the injury, was the agent or representative of the defendant corporation, in such sense that the order of Richard Garrity to use the rip-saw in the manner and for the purpose it was being used at the time of the injury would be the order of the defendant to use the said rip-saw." The objections to it are that there is no evidence that Page told plaintiff that he should obey the orders and commands of Garrity, or that Martin knew that plaintiff was under the direction of Garrity, and was required to obey his orders.

These objections are without foundation, for we think there is evidence to establish both propositions. It may be that the preponderance of it is to the contrary, but we are not dealing with a question as to the weight of the evidence. It is also con-
7 tended that the instruction is wrong for the reason that it holds the defendant to liability simply because Garrity was in control of the work as foreman or temporary overseer of the work. If we were to consider the instruction apart from the evidence in the case, it is likely that it would be condemned. But, as applied to the evidence, it was a correct statement of the law as we have announced it in the first paragraph of this opinion.

III. The ninth instruction was as follows: "As before stated, it is conceded that there was not any actual direction given by Page to the plaintiff, at the time of the injury, to obey Garrity in reference to the work at which he was engaged when injured, but it is claimed by the plaintiff that he was acting in obedience to prior directions from Martin to obey Page, and from Page to obey Garrity; and in determining whether or not plaintiff is justified in claiming that he was thus acting under the direction of the defendant, in obeying Garrity, you are to consider all the evidence in relation to that matter; what, if anything, was said by Martin to plaintiff in relation thereto; what, if any, knowledge Martin had in relation to Garrity commanding or directing the plaintiff; what, if anything, he said and did in relation thereto; what, if anything, was said by Page to the plaintiff in relation to obeying Garrity; whether such commands, if any, were for the plaintiff to obey in particular instance or instances, or in every instance; and all facts and circumstances in evidence bearing upon said matter. And if, from the consideration of all the evidence and the circumstances, you believe that

Martin commanded the plaintiff to obey Page in all instances, and that Page commanded plaintiff to obey Garrity in all instances, or that Martin and Page gave plaintiff such commands to obey as a reasonably prudent boy of the age and experience of the plaintiff at that time would understand and believe to be an order to obey Page and Garrity in every instance, and plaintiff did so, in good faith, believe, then you would be warranted in finding that he was acting under the direction of defendant, in obeying Garrity, but not otherwise." This instruction is criticised because it is said there is no evidence to support it. In this we cannot agree with counsel. Properly construed, it had evidence in its support, and it is not subject
8 to the criticism made. The latter part of the instruction is also challenged because, it is said, it makes the defendant liable for the plaintiff's mere belief as to the orders given him. We think this objection is well taken. An order designed for one purpose, and misunderstood for another, would not be an order for the latter purpose. *McCarthy v. Railroad Co.*, 83 Iowa, 485 (50 N. W. Rep. 21).

IV. Appellant's counsel make the following sub-heading to one division of their argument: "The Fact that the Plaintiff was a Minor does not Make Garrity a Vice-Principal."

This is a proper statement of the law, but we fail to find where the court below held anything to the contrary. The instructions tell the jury that they may consider the plaintiff's minority, in deter-
9 mining the question as to whether he had intelligence enough to appreciate the dangers that were involved in the employment, and that they might also consider the plaintiff's age, in determining whether or not he was guilty of contributory negligence. These instructions do not tend to hold the defendant

to liability because the minority of the plaintiff made Garrity a vice-principal.

In this connection, we may consider the objection lodged against the eleventh instruction. This part of the charge related to the subject of contributory negligence, and told the jury, in effect, that they should consider the plaintiff's minority solely upon the question as to whether or not one of his years and experience and intelligence could and did know or appreciate the danger, if any, there was in operating the rip-saw. This instruction was in accord with the voice of authority, and was properly given. *Merryman v. Railway Co.*, 85 Iowa, 634 (52 N. W. Rep. 545); *McMillan v. Railway Co.*, 46 Iowa, 231; Beach, Contrib. Neg., section 136.

V. Appellant's counsel say, in argument, that the defendant, having furnished the proper machine, is not liable, where the servant makes use of it for an improper purpose. This statement announces
10 a correct rule of law. But does it apply to the case at bar? Here there was evidence tending to show that the plaintiff was not informed by any one that the cut-off saw was the one, or the only one, to be used in cutting the kindling; and that he was ordered to obey the directions of Page, and, in Page's absence, to obey Garrity. It was plaintiff's duty to obey all orders given him by his superiors, unless their performance involved a hazard which no ordinarily prudent person would have subjected himself to. In obeying his superiors, he had a right to assume that they would subject him to no greater risks than his contract of employment contemplated, and that, on account of his age and inexperience, they

using the machines which they directed him to operate, he was but doing a duty to his employers. The rule of law relied upon by appellant's counsel is not applicable to the case. Our conclusions on this branch of the case find some support in the case of *Sprague v. Atlee*, 81 Iowa, 1 (46 N. W. Rep. 756).

VI. It is said that the evidence conclusively shows that plaintiff was guilty of contributory negligence, and that the verdict is contrary to the sixth instruction, which related to this subject. In view of a new trial, it is better that we express no opinion upon these matters.

VII. The court instructed the jury that, if they found for plaintiff, they could allow him as damages any sum not exceeding ten thousand dollars.

It appears from the record that the original petition asked for but five thousand dollars damages. Afterwards, by leave of court, this petition was amended so that the prayer was for ten thousand dollars, but the clause in the petition stating plaintiff's damages was not amended. This stood, as in the original petition, at five thousand dollars. The verdict was for eight thousand dollars. The court, however, reduced it to five thousand dollars; and after the verdict was returned, the plaintiff, by leave of the court, filed an amendment to his petition, stating that he was damaged to the amount of ten thousand dollars. The defendant complains of the instruction given by the court, and of the permission given the plaintiff to amend. It is no doubt

the error with reference to the amended pleading, but also the error in the instruction.

VIII. The instruction with reference to the measure of damages tells the jury that they may consider plaintiff's disfigurement of person as an element.

This is said to be error. We do not think so. We have uniformly held that this may be considered in personal injury cases. And such seems to be
12 the general rule. 1 Sutherland, Damages, section 158, and authorities cited; Thomas, Neg., p. 461c.

IX. Another element of damages, which the court permitted the jury to consider in the event they found for plaintiff, was for medical services rendered.

It appears that the doctor who attended the
13 plaintiff, charged eighty-one dollars for his work. Whether this charge was made against plaintiff, or his father, does not appear. But as the father, or, in the event of his death, the mother, was primarily liable for the bill, we must assume it was charged to him or her. And, if so charged, then the plaintiff cannot recover this item. But, if not so charged, we do not think plaintiff was entitled to recover this item, under the showing made. The liability was primarily that of the father. He was liable for the support and maintenance of his minor son, and it must be presumed that he will meet his obligation. Plaintiff, as a minor, cannot recover for these services; not, at least, until he has paid the bill. *Tompkins v. West* (Conn.) (16 Atl. Rep. 237).

X. Misconduct on the part of the plaintiff's attorney, was one of the grounds for a new trial. We have examined the record with reference to this mat-

XI. Some other questions are discussed by counsel. But as they are not likely to arise on another trial, we do not consider them.

XII. Plaintiff appeals from the ruling of the court, requiring him to remit three thousand dollars of the verdict. We do not think he is in a position to complain—*First*, on account of the condition of
 14 the pleadings, to which we have referred; *second*, because this matter rests peculiarly within the discretion of the trial court, and we see nothing to indicate that he abused this discretion. For reasons pointed out, the judgment of the district court is **REVERSED**.

NINA R. SPARKS, Administratrix of the Estate of
 SAMUEL P. SPARKS, Deceased, Appellee, v. THE
 NATIONAL MASONIC ACCIDENT ASSOCIATION, Appel-
 lant.

Foreign Corporation: POWER OF STATE OVER. A state has the power
 4 to prescribe the methods by which corporations doing business within it, may be brought into court, and to designate the officer, or agent, either of the corporation, or of the state, upon whom proper process may be served.

SAME. Under revised statutes, Missouri, section 5915, providing that any person who receipts for money on account of any insurance
 2 company not authorized to do business in the state for a policy in such company, though the same may not be required of him as agent, or who makes any contract for such company, shall be deemed its agent, evidence that the general agent of a foreign
 5 insurance company solicited applications in Missouri, which were forwarded by him to the home office, where they were entered on the company's register, the applicants paying such agent a membership fee, and that another person in the company's pay afterwards collected assessments in Missouri from the applicants, sufficiently shows that the company was transacting business in that state, though it was provided in the applications that they should not be binding until approved by the secretary in Iowa.

SERVICE OF NOTICE UPON: Presumptions. Under the statute of Missouri, requiring foreign insurance companies desiring to do business

100 459
 105 637

100 458
 111 405
 111 663
 111 654

8 in that state, to first file with the superintendent of insurance, authority to accept service of process in their behalf, and providing that such service shall be binding upon them, a company so served, and which is shown to have transacted business in the state, cannot question the validity of the service, on the ground that it has not complied with the law, such compliance being conclusively presumed from the fact of doing business in the state.

Pleading: GENERAL DENIAL: *Issue upon.* The right of a foreign administratrix to sue in Iowa without having qualified there, is

1 not in issue where a general allegation of plaintiff's capacity is met by a general denial, merely, instead of an averment of the facts relied on to show her want of capacity, as provided by Code, section 2717.

GRANGER, J., took no part in this case.

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

SATURDAY, DECEMBER 12, 1896.

THIS is an action brought in Polk county Iowa, upon a judgment rendered in favor of the plaintiff in the circuit court of Johnson county, Missouri. The defendant, in its answer, admits that it is a corporation organized under the laws of the state of Iowa, and denies all other allegations of the petition. It alleges that it never appeared in the suit in the circuit court of the state of Missouri, in which the judgment was rendered, and denies that personal service of process was ever made upon it; avers that it never complied with the laws of the state of Missouri, which provide under what circumstances a foreign insurance company may do business in said state; that it never appeared in said action in the state of Missouri, and no one was authorized to receive service of process for it; avers that the alleged judgment was procured through fraud; avers that it was not transacting business in the state of Missouri. The case was tried to the court, which found the following facts: (1) That on October 9, 1893, a judgment was entered in the

circuit court of Johnson county, Missouri, in favor of plaintiff and against the defendant for six hundred and fifty-three dollars and fifteen cents, with interest and costs. (2) When said judgment was rendered, the defendant was a foreign corporation transacting business in the state of Missouri. (3) That at the time the policy of insurance was issued to Samuel P. Sparks, which was the basis of the action upon which said judgment was entered, the defendant was doing an insurance business in the state of Missouri through agents. (4) That said company was not incorporated by or organized under the laws of said state. (5) That defendant did not comply with the laws of the state of Missouri touching the appointment and authorization of the superintendent of the insurance department to acknowledge or receive service of process issued by the courts of that state. The court held that, as the defendant was transacting business in the state of Missouri by its agents, it was "conclusively estopped from attempting to show that it has failed to comply with the statutes of said state." Judgment was entered against the defendant and in favor of the plaintiff, from which this appeal is prosecuted.—*Affirmed.*

Clark Varnum for appellant.

Cummins & Wright for appellee.

KINNE, J.—I. Plaintiff alleges in her petition

appointment in this state, she cannot prosecute this action. Defendant relies upon section 2368 of the Code, which provides: "If administration of the estate of a deceased non-resident has been granted in accordance with the laws of the state or county where he resided at the time of his death, the person to whom it has been committed may, upon his application, and upon qualifying himself in the same manner as is required of other executors, be appointed to administer upon the property of the deceased, in this state, unless another has been previously appointed." We are not required to determine whether, in a case like that at bar, the administratrix must be appointed and qualified in this state before she could sue upon the judgment rendered in the Missouri court, for such issue is not made in the pleadings. Under our statute (Code, section 2716), plaintiff was not required to state the facts showing her right to sue as administratrix. She need only aver, as she did, "generally or as a legal conclusion," her capacity. If the defendant intended to controvert such allegation, it should have pleaded the facts relied upon as showing her want of capacity to bring the suit in the courts of this state. Code, section 2717. This it did not do, but attempted to raise the question by a general denial. While, in a sense, this was a denial of the allegation, still it was not such a pleading as the law requires to put in issue the due appointment and qualification of plaintiff as administratrix. Hence, the allegation would be deemed admitted. *Mayer v. Turley*, 60 Iowa, 410 (14 N. W. Rep. 731).

II. The contention of appellant is that it did not transact an insurance business in the state of Missouri. Section 5915 of the statutes of the state of Missouri, which is in evidence in this case,

not at the time authorized to do business in this state, or who shall receive or receipt for any money from other persons to be transmitted to any such insurance company or association, either in or out of this state, for a policy, or policies, of insurance issued by such company or association, or for any renewal thereof, although the same may not be required by him or of them as agents, or who shall make, or cause to be made, directly or indirectly, any contract of insurance for such company or association, shall be deemed, to all intents and purposes, an agent or agents of such company or association." The next section provides for the punishment of an agent acting in the absence of proper authority from the state, or for a company not authorized under the law to transact insurance business in the state of Missouri. The evidence in this case shows that at about the time of the taking of the application of Samuel P. Sparks for his insurance, the defendant company took similar applications, and issued nearly one hundred policies, or certificates of membership to residents of the state of Missouri; that one R. L. Clarke, general agent of defendant, and one of its directors, solicited the application of various persons in the state of Missouri, who resided in the same town with Sparks, and received from each of them five dollars as a membership fee, and forwarded their applications to the home office in Des Moines, Iowa, and said office received the benefit of these membership fees. Thereafter, one Johnson, a resident of Missouri, at the instance of and by virtue of authority given him by the defendant, did, at the same place, collect the quarterly assessments from each certificate holder, and was paid by the defendant for said services. It also appears that the assistant secretary of the defendant company was in the state of Missouri, and solicited applications in the same way,

and that, as to applications taken by him, the business was conducted as heretofore stated. The defendant company claims that it never authorized these acts of its officers and agents, and knew nothing of them. In the light of the undisputed evidence, this claim appears, so far as knowledge of the agents' acts is concerned, to be entirely unfounded. The evidence shows that these agents forwarded the applications taken in the state of Missouri to the home office; that they were entered upon the defendant's register, and the initials of the agent, "R. L. C.," or "J. A. D.," were also entered upon said register opposite the name of the members whose insurance was solicited by them. It appears therefrom that the defendant at all times knew that its officers and agents were soliciting business in the state of Missouri, and it does not appear that any objection was made thereto, or any such application refused, because it came from a state in which the defendant was not by law duly authorized to transact the business of insurance. The general agent of the company took the application of Sparks, and as such agent gave him a receipt for the amount paid. It is said that, as the application taken provided that the same should not be binding until approved by the secretary, therefore the contract was made in Iowa, and no business was transacted in the state of Missouri. In view of the statute above set forth, these officers and others in the state of Missouri were the agents of the defendant, and engaged in transacting the business of insurance. Whatever the rule might be as to the acts of

N. W. Rep. 566); *Fred Miller Brewing Co. v. Capital Ins. Co.*, 63 N. W. Rep. 568*; 6 Thompson, Corp., section 7937.

III. Inasmuch as the defendant company was not incorporated in the state of Missouri, and as it had never made application to the state of Missouri for a permit to do business in that state, and had not appointed the insurance superintendent of the state of Missouri to receive service of process for it, and as no process was served upon the company or its agents, and it did not appear in the Missouri court, it is urged that the defendant was not legally served with notice

of the suit, and that the judgment rendered
3 therein is a nullity. The statutes of the state of Missouri touching this matter provide: "Any insurance company not incorporated by or organized under the laws of this state desiring to transact any business by any agent or agents in this state shall first file with the superintendent of the insurance department a written instrument or power of attorney, duly signed and sealed, appointing and authorizing said superintendent to acknowledge or receive service of process issued from any court of record, * * * and upon whom such process may be served for and in behalf of such company in all proceedings that may be instituted against such company in any court of this state, * * * and consenting that service of process upon said superintendent shall be taken and held to be as valid as if served upon the company, according to the laws of this or any other state. Service of process as aforesaid issued by any such court as aforesaid upon the superintendent, shall be valid and binding and be deemed personal service upon such company so long as it shall have policies or liabilities outstanding in

section it is provided that a foreign insurance company shall, before transacting business in the state, deposit a copy of its charter with the insurance department, and comply with many other conditions therein recited. Section 5891. It is also provided that no insurance company shall be permitted to do business in that state unless it "first fully comply with all the provisions of the laws of this state governing the business of insurance." Section 5911. It is also provided that agents acting for companies not conforming to the insurance laws of the state shall be deemed guilty of a misdemeanor, and fined. Section 5916. It is said in *Paul v. Virginia*, 8 Wallace, 168, that: "The corporation, being the mere creation of local law, can have no existence beyond the limits of the sovereignty where created. * * * The recognition of its existence, even, by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended when the existence of the corporation, or the exercise of its powers, are prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." *Hooper v. People*, 15 Sup. Ct. Rep. 207; *Insurance Company v. Raymond* (Mich.) (38 N. W. Rep. 482). That it is within the power of the state to prescribe the method by which corporations doing business

within it may be brought into court, and to designate the officer or agent, either of the corporation or of the state, upon whom proper process may be served, is well settled. *Gross v. Nichols*, 72 Iowa, 239 (33 N. W. Rep. 653); *Childs v. Manufacturing Co.*, 104 N. Y. 477 (11 N. E. Rep. 50); *Vorheis v. Society*, 86 Mich. 31 (48 N. W. Rep. 1087); 2 Cook, Stock., Stockh. and Corp. Law, section 758, note; *Fred Miller Brewing Co. v. Council Bluffs Insurance Co.*, 95 Iowa, 31 (63 N. W. Rep. 568); 6 Thompson, Corp., sections 7886-7888, 8027; *Moulin v. Insurance Co.*, 24 N. J. Law, 233; *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499 (25 Pac. Rep. 325); *Rothrock v. Insurance Co.* (Mass.) (37 N. E.

5 Rep. 206). We think, that when a foreign insurance company is shown to have transacted business in a state wherein, by statute, certain acts are required to be done by such company, before it has the right to transact business therein, a conclusive presumption arises that the company has complied with the requirements of the law in that respect. Under such circumstances, the company ought not to be allowed to plead, and show its own violation of law, as a defense to an action brought upon the policy. To so permit, would be inviting it to take advantage of its own wrongful act, perpetrate a fraud upon those who may deal with it in good faith, and in proper reliance upon the fact that the company had conformed to the law which authorizes it to transact business. 2 May, Insurance, section 577; 6 Thompson, Corp., sections 7960-8027; 2 Morawetz, Priv. Corp., section 982; *Ehrman v. Insurance Co.*, 1 Fed. Rep. 471; *Railroad Co. v. Harris*, 12 Wallace, 81; *Diamond Plate Glass Co. v. Minneapolis Mut. Fire Ins. Co.*, 55 Fed. Rep. 27; *Berry v. Indemitu Co.* 46 Fed. Rep. 439. *Sparks v. Association*

shall consent to be sued therein. If it do business there, it may be presumed to have assented, and it will be bound accordingly." In *Ehrman's Case* it is said: "The receipt of the premium and the execution and delivery of the policy by the company are equivalent to an assertion by the company that it has complied with the requirements of the statute to entitle it to do business in the state, and, as between the assured and the company, the latter is estopped, upon the soundest principles of the law and morals, to say that it has not done so. That the stipulation was not, in fact, filed with the auditor, is of no consequence if the company has done those things which imposed upon it the obligation and duty to file it. The law deduces the agreement on the part of the company to answer in the courts of this state, on service made upon the auditor, from the fact of its doing business in the state; and the presumption, from that fact, of assent to service in the mode prescribed by the statute, is conclusive, and no averment or evidence to the contrary is admissible to defeat the jurisdiction. The reason of this rule is that the obligation to file the stipulation is imposed for the protection of the citizens, and when, by its own act, its obligation to file the stipulation is perfect as between the company and citizen, the company will not be permitted to relieve itself from a liability which the written stipulation would have imposed, by pleading its own fraud on the law of the state and her citizens. In such cases the law conclusively presumes that to have been done which law and duty and the rights of the party contracting with the company required to be done." In the *Case of the Diamond Plate Glass Co.* the court says: "That the stipulation was not, in fact, filed with the auditor, is, therefore, of no consequence, if the company has done those things which imposed upon it the obligations and duty to file it.

* * * In such cases the law conclusively presumes that to have been done which ought to have been done." In *Berry's Case* it is held that a failure to comply with the state laws did not affect the validity of the company's policies, or in any manner operate to the prejudice of its policy holder. "By the fact of doing business in the state it asserted a compliance with the laws of the state, and, after enjoying all the benefits of that business, and receiving the money of the assured, it will not be heard to say that it never submitted 'to the jurisdiction of the state.' It can reap no advantage from its own wrong. To sustain this defense would be giving judicial sanction to business methods much below the standard of common honesty." We are aware of the fact that some courts have held that service made upon a state officer under such circumstances as exist in this case does not confer jurisdiction. We are not prepared, however, to assent to the soundness of such holdings which induce fraud, and render the company violating the law secure in the possession of funds taken from the assured, for which he either has received no consideration, or, as to rights upon which he is compelled to seek redress in some other jurisdiction. There can be no valid reason why this company, which voluntarily entered the state of Missouri, and solicited and obtained business there, in defiance of the laws of that state, should be permitted to shield itself from liability in this action behind the very illegal act by means of which it was enabled to obtain the money of the deceased. To so hold would be equivalent to offering a premium for the continuance of such illegal practices. Having received all the benefits which would have resulted from a compliance with the laws of the state of Missouri, this company seeks to repudiate its obligation because in prosecuting its business it was a wrong-doer. Such a doctrine is abhorrent to our sense of right and justice,

and the law looks not with favor upon one who thus seeks to rob the assured, or those to whom the policy is payable, of the protection it should afford. It is said that some of the cases cited above are not applicable, because there is no provision in the Missouri statutes for service on a foreign corporation which does business in that state without complying with its laws. The contention is of no force. The reasoning upon which the conclusion is based in those cases is quite as applicable when the facts are like those in the case at bar.

IV. Errors are assigned upon rulings of the court touching the admission of evidence. We need not discuss them, as the finding of facts and conclusion of law of the trial court are correct, regardless of the evidence claimed to have been improperly admitted. Discovering no error, the judgment below is **AFFIRMED**.

GRANGER, J., took no part in this case.

**THE BURLINGTON LUMBER COMPANY, Appellant, v. THE
EVANS LUMBER COMPANY, et al.**

Contracts: FRAUD: Reformation. A party to an oral contract, who, after its partial execution, is induced, by fraud or mistake, to sign what purports to be a written memorandum thereof, but which in fact contains provisions not in the oral contract, need not ask for a reformation of the writing, but may disaffirm it, and stand upon the oral agreement.

Appeal from Decatur District Court.—HON. W. H. TED-
FORD, Judge.

SATURDAY, DECEMBER 12, 1896.

Power, Huston & Power and *C. W. Hoffman* for appellant.

Harvey & Parrish for appellees.

ROBINSON, J.—The plaintiff is a corporation, engaged in business, at Burlington, Iowa. The defendants are the Evans Lumber Company, a co-partnership, which was engaged in business at Lamoni, Iowa, and John B. Evans and Melville Evans, the members of the co-partnership. During several years prior to the eleventh day of July, 1893, the plaintiff sold to the defendant company bills of lumber. On that date the defendants were somewhat embarrassed financially, and, it is alleged, entered into an agreement of settlement with the plaintiff. A writing was drawn at that time, and signed by the defendant company, which, the plaintiff claims, was as follows: "Lamoni, Iowa, July 11, '93. For value received, the Evans Lumber Company, of Lamoni, Iowa, does hereby assign and sell to the Burlington Lumber Company, of Burlington, Iowa, the entire stock of lumber, lath, shingles, and all other material known and considered as a part of the lumber yard of the Evans Lumber Company of Lamoni, Iowa, which is situated on lots 15, 16, 17, and 18, in block No. 9, in the town of Lamoni, Decatur county, Iowa, at the agreed price of \$4,237.74. That the consideration for this transfer and assignment is in part payment of a debt of the Evans Lumber Company to the Burlington Lumber Company, of Burlington, Iowa, which debt is for the sum of \$11,565.34, with accrued interest; and it is agreed that the said Burlington Lumber Company is to have immediate possession, ownership, and control of the above-described property, upon the signing of this transfer. It is also agreed and understood that the Evans Lumber Company is to have credit upon the

above-mentioned indebtedness to the full [net] value of said property [as realized in the ordinary course of business, in the sale of said property by the Burlington Lumber Company, which sale shall be, as soon as may be, not exceeding one year from this date]. The said Evans Lumber Company also sell, assign, and transfer absolutely to the Burlington Lumber Company aforesaid, each and all of the notes, accounts, books of account, and all debts due the said Evans Lumber Company, contracted or growing out of the firm business of said Evans Lumber Company, including specifically all debts as shown by the books of said firm, all of which are, at this time, transferred to the said Burlington Lumber Company. It is specifically agreed, however, that on this item credit shall only be allowed on the principal debt *so far as said accounts and notes go at their face value, and we are liable for the deficiency, if any* [as per the net collections of the Burlington Lumber Company therefrom], and this shall not be construed as evidence that the [whole] *balance* of debt is not now due. All fixtures, office furniture, and property of any and every kind and description, used in and about said premises and business, is included in this transfer. Witness this July 11th, 1893. [Signed] Evans Lumber Company, by M. Evans and J. D. Evans." Eleven days after this instrument was signed the Evans Lumber Company wrote to the plaintiff, and offered to rescind the agreement, on the ground that it was procured by fraud; and made a demand for the return of the property; but the offer was not accepted, nor was the property received on the settlement returned. The plaintiff claims it is entitled to recover of the defendants a balance of four thousand nine hundred and sixty-five dollars and forty-nine cents on account of the sales made to them. The defendants claim that the plaintiff has received the full amount due it in property belonging to the defendants, of the value of

nearly thirteen thousand dollars, which the plaintiff took possession of and converted to its own use; that the plaintiff claimed to take possession of the property by virtue of the writing which we have set out, but that the writing was procured through fraud, and is not of any force; that the stock of lumber, accounts, notes, and other property, were turned over to the plaintiff, and possession thereof taken by it, before the writing was signed; that the plaintiff took possession of the property so delivered, and mingled with it other property of the plaintiff in such a manner that it cannot be identified, and has sold the lumber and collected the notes and accounts, and is liable to the defendants for their value. The plaintiff admits that it took possession of the property in question under the instrument in writing, and denies all the allegations of fraud in regard to it. The amount of the verdict and judgment for the plaintiff was six hundred and fifty-nine dollars and forty-two cents, besides costs.

I. The appellees testified, as witnesses, that on the day the writing in controversy was signed, they made a verbal agreement with the plaintiff, by which they agreed to turn over their stock of lumber, notes, accounts, and other property in Lamoni,—the notes and accounts at their par value, and the lumber and other property at their invoice value,—to be applied in payment of the claim the plaintiff held against the defendant, and that the lumber, notes, accounts, and other property were turned over according to the agreement; that, after that was done, the parties attempted to reduce the verbal agreement to writing; that the writing in controversy was accordingly prepared by the attorney for the plaintiff, but that he wrongfully inserted therein the words which are in brackets, which were not any part of the agreement; that the words which we have italicized were in the

agreement as made, but were wrongfully omitted from the writing; that, after it was completed, and before it was signed, the attorney read it to the defendants, pretending to read the italicized words as though they were inserted in the writing where they now appear in the copy we have set out, and omitting to read the words included in brackets; that the alterations and the reading were fraudulent, for the purpose of deceiving the defendants, and inducing them to sign the writing; that they were unable to read it, and, believing it was correctly read, and that it set out the agreement they had made, they signed it; that, when they discovered the fraud, they at once rescinded the contract, and have ever since refused to be bound by it. The appellant contends that the contract of the parties was reduced to writing, and, therefore, that, until reformed, the writing must control. Ordinarily, when parties enter into a written agreement, all negotiations which led to it will be deemed merged in the writing, and that will be held to express the real contract of the parties, and to control, even though erroneous, until reformed by competent authority. But that rule does not apply to a contract obtained by fraud, and for that reason voidable, which has been rescinded by the party defrauded, nor when, by reason of the fraud, the contract is absolutely void. If a person fix his signature to a writing which he has been fraudulently induced to believe, without fault on his part, is different from what it is, and from what he intended to sign, he is not bound by the writing. "Such a contract is not merely voidable; it is void." Bishop Cont., section 646. It was said, in *Doe v. Clark*, 42 Iowa, 123, that "an instrument in writing may be defeated in an action at law as well as in equity," and the right of the plaintiff to recover at law money received as rent, notwithstanding a fraudulent assignment of the lease, was sustained. See, also, 2 Parsons

Cont., 782; 1 Benjamin, Sales, sections 636, 649. In *Carey v. Gunnison*, 65 Iowa, 703 (22 N. W. Rep. 934), the plaintiff sought to recover damages for a breach of contract. The defendant alleged that the agreement was entered into through the fraud of the plaintiff, and by mutual mistake. It was held that the defense pleaded could be made at law, and that a reformation of the agreement was not necessary. What was said in regard to a mistake, not in regard to the subject-matter of the contract but in the terms of the writing employed to express it, is not applicable in this case, for the reason that the contract in suit is attacked for fraud, and not on the ground of mutual mistake. The case of *Linton v. Fireworks Co.* (N. Y.) (28 N. E. Rep. 580), also relied upon by the appellant, did not involve fraud, but a mistake with reference to the language used to express the actual agreement.

In this case the defendants claim that an oral agreement for the transfer of the lumber, notes, accounts, and other property was made, and the possession of the property was transferred to the plaintiff by virtue of that agreement, after which the parties attempted to reduce the agreement which had thus been made and carried into effect to writing, and that, by the fraudulent procurement of an agent of the plaintiff, the defendants were induced to sign a writing which did not represent the real agreement. They did not obtain anything by virtue of it, excepting the right to have credits made on their debt to the plaintiff. The latter obtained all the property which was transferred by the agreement, and hold all which they have not disposed of for their own benefit. The defendants did what they could to rescind the agreement as soon as they discovered the fraud alleged, and the plaintiff cannot claim anything from their silence, or acquiescence. There was no necessity for a reformation of the writing, because the

defendants do not claim anything under it, and for the further reason that, if their claim in regard to it be true, it is absolutely void, and the verbal agreement remains in force. There is some confusion in the pleadings on which the cause was tried. They do not specifically allege that the property in question was turned over to the plaintiff by virtue of a verbal agreement made before the written one was signed, but the case was tried on the part of the defendants according to that theory, notwithstanding the fact that it was in conflict with the averments of their answer that the plaintiff took possession of the property under the agreement in writing.

II. The court failed to charge the jury in regard to the verbal agreement, although asked to do so by the plaintiff, but instructed that, if the written contract was found to be fraudulent, the jury should ascertain the reasonable market value of all the property of the defendants of which the plaintiff acquired possession, to deduct therefrom certain items, and from the balance thus found to ascertain the amount due the plaintiff. One of the theories of the defendants was that the plaintiff mingled with the lumber it obtained from the defendants, other lumber, making it impossible to distinguish and separate the property of the defendants, and that a conversion of the property was thus accomplished. There could not have been a conversion if the property was turned over to the plaintiff by virtue of the verbal agreement to which the defendants testified, and in that case the plaintiff would have been liable to account for the par value of the notes and accounts and the invoice value of the lumber. Therefore, the charge of the court was not strictly correct. But it is not claimed that the sums to be allowed for the property, if it was received under the verbal agreement, were less than its reasonable market value, and the plaintiff could not have

been prejudiced by the error in the charge. On the contrary, we are satisfied that its effect, if any, was beneficial to the plaintiff.

III. It is insisted that the evidence does not justify the finding that the writing in controversy was fraudulent. It seems to us quite probable that the writing contained some provisions which the parties had not mentioned in the preliminary agreement, and which were not discovered when the writing was read, but that would not have been controlling. We have examined the writing, and the testimony in regard to it, with much care, and, although we should not have reached the conclusions which the jury did in regard to the alleged fraud, we cannot say that the finding was so far unsupported by the evidence that the verdict should have been set aside. The plaintiff has referred to other questions, including alleged misconduct of counsel; but we do not find in any of them ground for disturbing the judgment of the district court. It is, therefore, **AFFIRMED**.

DENNIS O'CONNOR, Appellant, v. ADELIA O'CONNOR, et al.

Deed: DELIVERY. Plaintiff executed a deed to his children, leaving it with the justice who took the acknowledgment. The deed was
 1 sent to the recorder by the justice, but was recalled by the plaintiff before recorded. The grantees had no knowledge of the existence of the deed until about a year later, when plaintiff's wife, without his knowledge or authority, gave it to one of the grantees, who had it recorded. *Held*, that there was no delivery of the deed by the grantor, sufficient to render it operative.

ESTOPPEL: Laches. A delay of nearly four years in taking any steps to cancel a deed, after the grantor knows that it has been handed
 2 to grantees, and recorded by the latter without grantor's consent, will not bar an action to set it aside; nor will the fact that the grantor, in the interval, made statements insufficient as the basis of an estoppel, to the effect that he had no interest in the property, where he was over seventy years of age, and illiterate, and the grantees were his wife and sons,

Appeal from Jackson District Court.—HON. A. J. HOUSE,
Judge.

SATURDAY, DECEMBER 12, 1896.

ACTION in equity to set aside an alleged conveyance of real estate, and to quiet in plaintiff the title to the property described in the conveyance. There was a hearing on the merits, and a decree in favor of the defendants, Adelia O'Connor, Fergus O'Connor, and Mary O'Connor. The plaintiff appeals.—*Reversed.*

W. C. Gregory and *L. A. Ellis* for appellant.

J. C. Longueville and *Levi Keck* for appellees.

ROBINSON, J.—The plaintiff claims to be the owner in fee simple of a farm in Jackson county, which includes about three hundred and forty-four acres of land. On the twenty-fourth day of November,
1 1888, he signed and acknowledged an instrument in writing, which purported to convey the land to Bridget O'Connor, the wife of the plaintiff, and to his sons, C. J. O'Connor, Charles T. O'Connor, and Frank P. O'Connor, in consideration of love and affection and one dollar in hand paid. The instrument was recorded on the seventh day of July, 1890. The plaintiff admits that he signed and acknowledged the instrument, but avers that he did so when he was temporarily insane, and that the instrument was never delivered, but that it was wrongfully taken from his possession by his wife, and recorded without his knowledge or consent. The plaintiff has been married twice,—the last time nearly forty years ago, to the defendant, Bridget O'Connor. By his first wife he had three children, all of whom are living. By his second wife he had three sons and three daughters,

who were living when the deed was executed. Those three sons were named as grantees in the deed. C. J. O'Connor, one of the sons named as grantee, is now dead. He left a widow, Adelia, and two children, Fergus and Mary O'Connor. These three, the administrator of C. J. O'Connor, and the three surviving grantees, are made parties defendant. But the widow and children of the deceased grantee are the only ones who contest the claims of the plaintiff. The district court found and adjudged that the title to an undivided one-fourth of the land in controversy was vested in them, and dismissed the petition of the plaintiff. The claim of the plaintiff, that he was not of sound mind when he executed the conveyance is not sustained by the evidence, but it appears that at the time of its execution he was having some domestic trouble in regard to his property. C. T. O'Connor, or "Chris," as he is called, wished his father to help him to a farm, and his mother joined him in trying to influence his father to aid him; but the father refused, and his refusal seems to have caused ill feeling. Chris left home, and while he was away the father applied to a justice of the peace, who lived three miles distant, to draw the deed. After it was signed and acknowledged, it was left with the justice. The plaintiff claims that no directions were given to the justice in regard to the disposition of the deed, but it is probable that he was told to send it to the county recorder, to be recorded, for he at once forwarded it to the recorder's office. The deed was drawn on a Saturday. After the plaintiff returned home on the day it was drawn, he told his wife something of what he had done, and she objected to it. On the next day the parish priest was consulted, and appears to have disapproved the making of the deed. As a result of these conferences, the priest wrote a note to the recorder, which was signed by the plaintiff,

and appears to have been a request to return the deed. On the same day a son of the plaintiff was sent to the recorder's office for the deed. He went a part of the way on Sunday, and arrived at the recorder's office on Monday morning, after the deed had been received by the recorder, but before the envelope in which it was sent had been opened. The recorder refused to deliver the deed to the son, but did not then record it, and a few weeks later gave it to the plaintiff. He carried it to his home, and placed it with other papers in his possession. More than a year after that was done, and during his absence in Dubuque, the wife took the deed from the receptacle in which he had placed it, and gave it to Chris, who took it to the county recorder, and had it recorded. That the deed was recalled from the recorder's office when it was sent there by the justice before it was recorded is shown beyond question, and is not disputed. But it is contended by the appellees that leaving the deed with the justice for the purpose of having it forwarded for record, was a sufficient delivery to the grantees, and effectual to transfer the title to them. Whether that was true depends upon the facts in the case. The deed was not left with the justice pursuant to any agreement with the grantees, nor does the evidence show that it was executed to carry into effect any agreement with them. What the plaintiff did was wholly voluntary. He denies that he authorized the justice to forward the deed for record and insists that it was left with him to be called for at a later time. The justice is dead and the plaintiff is the only one who knows what instructions were given to him. But the circumstantial evidence strongly favors the theory that the justice only obeyed instructions. It is well settled that a deed, to be effectual to convey title, must be delivered, and that acceptance by the grantee is essential to a

completed delivery. *Day v. Griffith*, 15 Iowa, 104. The filing of a deed for record, unless done in pursuance of a previous agreement, is not usually effective to transfer title. *Deere v. Nelson*, 73 Iowa, 187 (34 N. W. Rep. 809); *Cobb v. Chase*, 54 Iowa, 253 (6 N. W. Rep. 300); *Moody v. Dryden*, 72 Iowa, 461 (34 N. W. Rep. 210). See also *Richardson v. Grays*, 85 Iowa, 152 (52 N. W. Rep. 10). None of the grantees in this case ratified the sending of the deed to the recorder's office as a delivery to them, and Chris did not know anything of what had been done until after the father had decided not to have the deed recorded. The most that can be said in favor of the claim of the appellee is that the plaintiff intended a delivery of the deed, but that, before it was accomplished, he changed his mind. There was nothing in the transaction which prevented his doing so. The cases of *Robinson v. Gould*, 26 Iowa, 89; *Cecil v. Beaver*, 28 Iowa, 246; *Hinson v. Bailey*, 73 Iowa, 544 (35 N. W. Rep. 626), and *Hoffman's Estate v. Hoffman*, 81 Iowa, 294 (46 N. W. Rep. 1106),—relied upon by the appellees, are unlike this case in controlling facts. There can be no doubt that there was no delivery of the deed when it was made, and that it was obtained and recorded by Chris

2 wrongfully. The plaintiff did not take any steps to cancel the deed until nearly four years after it was recorded, and at different times made statements to members of the board of equalization and others to the effect that he had no interest in the property. But he was over seventy years of age, and illiterate. His conduct and statements are no doubt, due in part, to those facts, and in part to the relationship he bore to all parties in interest. There was nothing of a contractual nature in what he said or failed to do, and nothing which should have the effect of an estoppel is either pleaded or shown. It appears, however, that after the deed was made Chris took

possession of a part of the land which contained ninety-four and one-half acres, and erected a dwelling house and stable thereon, and otherwise improved it, and paid taxes thereon for the years 1890 and 1891. It is said this was done under an agreement between the plaintiff, his wife, and Chris. The claim is not sustained by the evidence. Whether the appellees are entitled to recover for the improvements made and taxes paid by Chris we do not decide, for the reason that but little attention has been paid in argument to that branch of the case; and as it does not appear to have been considered by the trial court, and since the conclusion we reach in regard to the instrument in controversy requires a reversal, the cause will be remanded for a decree in harmony with this opinion, and with leave to the widow and heirs of C. J. O'Connor to establish, if they can, a valid claim for improvements made and taxes paid by him.—REVERSED.

PAUL GRAFF, Appellant, v. E. B. ADAMS, *et al.*

Good Faith Buyer of Note: BURDEN OF PROOF. The burden is on
8 the maker of a note to show that the holder thereof is not a *bona fide* purchaser.

PRESUMPTIONS. The presumption that a note was not negotiated
8 until after maturity, arising from the fact that it was in the hands of an agent of the payee after that time, is overcome by the direct testimony of the holder that he purchased the same before maturity, corroborated by the testimony of the treasurer of the payee.

Order of Proof: DISCRETION. Where, in an action on a purchase-
2 price note by the holder, claiming to be a *bona fide* purchaser, for value, before maturity, defendant denies such claim, and defends on the ground of a breach of warranty in the sale, the court may admit evidence on the question of breach of warranty without first submitting to the jury whether plaintiff was a *bona fide* purchaser.

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Use of Copy: OBJECTIONS. A written agreement may be proven by
1 copy, unless objection is made on the ground that the copy is not
the best evidence, or that the proof of the loss of the original has
not been made.

Appeal from Hardin District Court. — HON. BEN. P.
BIRDSALL, Judge.

SATURDAY, DECEMBER 12, 1896.

ACTION at law to recover an amount alleged to be
due on a promissory note. There was a trial by jury,
and a verdict and judgment for the defendants. The
plaintiff appeals.—*Reversed.*

Huff & Ward for appellant.

Albrook & Lundy for appellees.

ROBINSON, J.—The note in suit was given on the
tenth day of August, 1892, for the sum of three hun-
dred dollars, and was payable on the first day of Janu-
ary, 1894, with interest thereon at the rate of ten
per cent. per annum. It was one of three notes, for
three hundred dollars each, given by the defendants,
E. B. Adams and J. R. Chance, to C. Aultman & Co.
for an engine, separator, stacker, and tank. Of the
other notes, one was payable on the first day of Janu-
ary, 1893, and one on the first day of January, 1895.
The making of the notes is admitted by the defend-
ants, but they allege that the property for which they
were given was sold to them with a special written
warranty, which has been broken; that by reason of
defects in the property, which were covered by the
warranty, it is worthless to the defendants; that, when
the defects were discovered, the defendants offered to
return the property to C. Aultman & Co.; that it was
then agreed that the defendants should retain the
property and make such payments thereon as they

could, and that C. Aultman & Co. would repair the machine for the next season, and make it work; that the defendants, in pursuance of that agreement, paid to the company one hundred dollars, but that it has wholly failed to perform its agreement to make the machine work, and that it is absolutely without value, and is held by the defendants as the property of the company. The defendants further allege that the company did not transfer the note in suit until after it was due.

I. The plaintiff complains of the admission in evidence of a copy of the warranty on which the defendants rely. The answer avers that the original had never been in the possession of the defendants.

1 On the trial they showed that the original had never been delivered to them, but, without proving its loss, and without showing that they were unable to produce it, offered a copy in evidence. The plaintiff objected to it on the ground that the defendants, in their answer and counter-claim, did not rely upon it, and because the plaintiff was an innocent purchaser of the note for value before maturity. It was not objected that the copy was not the best evidence, nor that the proper foundation for its introduction had not been laid. The defense was based on the written warranty, and it was competent, in the absence of proper objection, to prove that by a copy. Whether the plaintiff was an innocent purchaser of the note was a controverted question, to be determined on all the evidence which was relevant to it; and the ground of objection which attempted to raise it was not well taken.

II. Complaint is also made of rulings of the court which permitted the defendants to show the alleged breach of warranty and the negotiations and agreements of the parties in regard to it. We do not find any error in such rulings. The breach of warranty

was wholly immaterial, if the plaintiff was an innocent purchaser of the note, before due, for a
2 valuable consideration; otherwise, it was not, and the court could not determine, until the evidence was offered, whether it would be sufficient to require the question in regard to the character of the plaintiff's alleged purchase to be submitted to the jury. It was within the power of the court to receive evidence on both branches of the defense as it was offered by the defendants.

III. The appellant complains of the third paragraph of the charge to the jury. It was erroneous, in that the plaintiff was named, when C. Aultman & Co. was intended, in referring to the alleged warranty and the offer of the defendants to return the machine. The error was clerical, and, in view of other portions of the charge, could not have misled the jury; and, in fact, was of a nature to benefit the plaintiff. However, it should be corrected, in case of another trial.

IV. Did the evidence warrant the verdict? The burden was on the defendants to establish the alleged warranty, and the breach thereof, and their right to return the machine to the company; and we are of the opinion that the evidence with respect to that issue
3 was sufficient to require that it be submitted to the jury. The burden was also on the defendants to show that the plaintiff was not an innocent purchaser of the note, before it was due, for a valuable consideration. *Trustees v. Hill*, 12 Iowa, 476. We think they have failed to make the required proof. What they show in regard to that issue is as follows: C. E. Albrook, testified that a representative of C. Aultman & Co. called at his office in the latter part of the year 1893, or the first part of the year 1894, twice, and had in his possession notes. Albrook thinks the first call was in September or October, 1893, and that the second was in January, 1894; that, when the

representative called the last time, he had the three notes given to the company by the defendants, two of which were then due; that the witness had been collecting on account of the company for several years, and that the representative called to leave the three notes for collection; that the witness refused to receive them, because he had been consulted by the defendants with reference to their defense to them, but that other notes were left with him. The witness did not know the name of the agent, but had seen him several times. There was nothing to show the authority of the agent, excepting the fact that he had notes which had been made to C. Aultman & Co., some of which he left with the witness. It does not appear that he made any representations in regard to the ownership of the notes, and his statements with respect to his own authority as agent would not have been competent. Albrook does not state whether the blank indorsement by the company which now appears on the note was there when he thinks he saw it; and the only evidence of ownership which his testimony discloses, is that a person who in some manner represented the company, had the note in suit in his possession after it was due, and desired to leave it for collection. It is also shown that the company commenced an action against the defendants, which was pending in the Hardin district court at the February, 1894, term, the petition in which purported to seek a recovery on the three notes the defendants had made to the company, and the foreclosure of a chattel mortgage given to secure their payment. That action was dismissed on the seventh day of March, 1894, without prejudice. It is explained by H. L. Huff and George W. Ward, the attorneys for the company who brought the action, as follows: Huff states that, a short time before the sixth day of February, 1894, when the action was commenced, he received the first of the

three notes given by the defendants, with the chattel mortgage, from a person who he supposed was the agent of the company, but that the note in controversy in this action was not received until about the second day of March following, and that it was then received from the plaintiff. Ward was absent at the time the note and mortgage were left with Huff, and on his return he was directed by Huff to prepare the papers necessary to recover the amount of the three notes, and to foreclose the mortgage, but that only one note, the first of the three, was then in his possession, and that he prepared copies of the others from that one. He wrote for the other two notes, but, not receiving them, the action was dismissed. This testimony is not contradicted by any one, and must be taken as true, although the petition in the action dismissed was verified by Ward, and he stated in the verification that the papers on which the action was brought were in his possession. That was not correct, yet it is explained in the manner stated. There is no other evidence which tends to show that the note in suit was in the possession of or owned by the company after maturity. If it be true that one of its agents had possession of the note after due, that fact, unexplained, would authorize a presumption of continued ownership; but the note was secured by a mortgage, which also secured at least one other note owned by the company, and the agent may also have acted for the plaintiff in offering the note in suit to Albrook for collection, if that was done. To rebut the evidence for the defendants, and to prove ownership of the note in suit, the plaintiff testified that he purchased it of the company in January, 1893, and that he paid it therefor, at the time of the purchase, three hundred and six dollars; that he had purchased similar paper from the company for twenty years, and that

he made the purchase in the usual course of business; that he had no knowledge of any defense to the note, or warranty of property, but made the purchase in good faith and in the usual way. T. D. Cunningham, cashier of a bank of which the plaintiff is president, and Melville B. Cox, treasurer of C. Aultman & Co. in January, 1893, fully corroborate the plaintiff, stating in positive and direct terms that he purchased the note of the company in January, 1893. Cox states that the consideration paid by the plaintiff for the note was about three hundred and six dollars. This testimony was sufficient to overcome any presumption of ownership which might arise from the possession of the note by an agent of the company in January, 1894, under the circumstances stated.

We conclude that the verdict was not sustained by the evidence, and the judgment of the district court is therefore REVERSED.

MRS. M. L. CASE, Appellant, v. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

100	487
114	88

Contributory Negligence: SPECIAL AND GENERAL VERDICT. A general verdict for plaintiff for injuries caused by failure of a locomotive approaching a highway to give signals at the distance therefrom required by Acts Twentieth General Assembly, chapter 104, section 1, whereby plaintiff's horse approached near the railroad, and became frightened, is not overcome by special findings that plaintiff did not look, or listen, for a train before reaching an opening, one hundred and thirty-four feet from the railroad, in a hedge extending along the side of the highway, and that there was a place between such opening and plaintiff's house (the distance not being shown) at which plaintiff could have known of

ACTION at law to recover damages for personal injuries alleged to have been caused by negligence on the part of the defendant. There was a trial by jury, and a verdict for the plaintiff in the sum of fifty dollars. Special findings were returned by the jury, upon which the court, on the motion of the defendant, rendered judgment in its favor for costs. The plaintiff appeals.—*Reversed.*

Shortley & Harpel for appellant.

Edmund Nichols for appellee.

ROBINSON, J.—The petition alleges that a railway owned and operated by the defendant crosses a public highway a short distance east of the city of Perry; that on the seventh day of June, 1894, while the plaintiff was on her way to Perry, riding in a buggy drawn by a single horse, and approaching from the north the crossing described, a train of the defendant passed over the crossing from the east; that the employes of the defendant, who were operating the locomotive engine of the train, neglected and omitted to sound the whistle at least sixty rods before reaching the crossing, and failed and neglected to continuously ring the bell on the engine for that distance, in approaching and passing the crossing. The petition further alleges, that by reason of the failure to sound the whistle and ring the bell, the plaintiff was unaware of the approach of the train until so near the crossing that her horse became frightened and unmanageable, causing her, while endeavoring to control the horse, to be thrown on and against a wheel of the buggy, thus causing certain injuries, which are described, and for which she seeks to recover. The petition also alleges that the plaintiff did not, by negligence on her part, contribute to the accident and resulting injuries. The answer contains

a general denial, and pleads contributory negligence on the part of the plaintiff. The evidence submitted on the trial is not set out, but the abstract alleges that the plaintiff introduced testimony tending to sustain the issues on her part, and showed that, at the time of the accident, there was a willow hedge on the east side of the highway, over which she was passing; that the hedge extended from the north line of the defendant's right of way a distance of thirty-one rods; that there was an opening in the hedge of about twelve feet in length, one hundred and thirty-four feet north of the track, where it intersected the highway; that at the time of the accident the plaintiff was approaching the crossing in question from the north, and the train was approaching it from the east. The special findings of the jury are shown by interrogatories submitted to it, and the answers thereto, as follows: "Int. 1. Was there a point north of the opening in the hedge at which plaintiff could have seen the approaching train? Answer. No. Int. 2. Did the plaintiff listen for a train from the east at any time before reaching the opening in the hedge? Answer. No. Int. 3. Did the plaintiff look for a train from the east at any time before reaching the opening in the hedge? Answer. No. Int. 4. How far east of the highway crossing was the engine when the whistle was blown and the bell rung? Answer. Less than sixty rods. Int. 5. Was there a place on the highway between the opening in the hedge, one hundred thirty-four feet north of the track and plaintiff's residence, at which plaintiff could have known of approaching train if she had looked and listened? Answer. Yes." The grounds of the motion for a judgment on the special findings were stated as follows: "(1) The special findings are manifestly inconsistent with the general verdict, and in direct conflict therewith. (2) That the special findings, taken in connection with

the pleadings, show conclusively that the defendant is entitled to judgment. (3) The special findings of the jury show affirmatively facts which defeat plaintiff's right of recovery. (4) The special findings affirmatively show the plaintiff to have been guilty of negligence contributing to the injury complained of."

Section 1 of chapter 104 of the Acts of the Twentieth General Assembly requires that a bell and a steam whistle be placed on each locomotive engine operated on any railway in this state, and that the whistle "be twice sharply sounded at least 60 rods before a highway crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed. * * *" The statement of the abstract in regard to the evidence, and the fourth special finding, show that this requirement was not observed, and that the defendant was in that respect negligent. When the special findings of a jury are inconsistent with its general verdict, the former control, and judgment may be rendered accordingly. Code, sections 2809, 2858. But it is only when the special findings are manifestly inconsistent with the general verdict that the latter can be set aside, and judgment be rendered on the former. *Johnson v. Miller*, 82 Iowa, 697 (47 N. W. Rep. 903), and (48 N. W. Rep. 1081); *Conners v. Railway Co.*, 71 Iowa, 492 (32 N. W. Rep. 465); *Coffman v. Railway Co.*, 90 Iowa, 462 (57 N. W. Rep. 955). Ordinarily, it is the duty of a person about to cross a railway track to look for an approaching train, or if the view be obstructed to

his fault, in some dilemma, some place of danger, where the exigencies of his situation and an emergency may excuse him for going on the track without looking and listening."

The special findings show that there was a place on the highway, between the opening in the hedge, one hundred and thirty-four feet north of the track, and the plaintiff's residence, at which she could have known of the approaching train had she looked and listened for it, but the distance of that place from the track is not shown. It may have been so far away that reasonable prudence did not require the plaintiff to look and listen there. It cannot be said, as a matter of law, that she was negligent in not looking or listening for the train before she reached the opening in the hedge near the track. The fact that it would have been possible for the plaintiff to have seen or heard the approaching train before she reached that opening, does not show that she was negligent in failing to look or listen for it. *Hamilton v. Railroad Co.*, 36 Iowa, 40. Facts which the special findings do not disclose may have shown that reasonable care on her part did not require her to do either. The court charged the jury at considerable length in regard to the care which the plaintiff was required to prove that she had exercised to entitle her to recover, and the general verdict shows that the jury found that she did not, by her negligence, contribute to the accident. In our opinion, the special findings do not show that she was negligent. It may be that the evidence showed that she was, but, if so, it did not authorize a judgment against her on the special findings, but only a new trial. We conclude that the district court erred in sustaining the motion of the defendant for judgment. —REVERSED.

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF
THE STATE OF IOWA
AT
DES MOINES, JANUARY TERM, A. D. 1897,
AND IN THE FIFTY-FIRST YEAR OF THE STATE.

S. M. BIBBINS, Appellant, v. POLK COUNTY, *et al.*

Taxes on Personal Property: LIEN ON REALTY: Mortgage. Code, section 865, providing that taxes assessed on personalty shall be a lien on the land of the persons assessed, does not make such lien prior to the lien of a previous mortgage executed on land, by the owner. *Bibbins v. Clark*, 90 Iowa, 230, *followed*.

Voluntary Payment of Taxes: CONSTRUCTION OF STATUTE. The payment by a second mortgagee of land, of a lien for taxes, inferior to such mortgage, to induce the prior mortgagee to discontinue an action to foreclose his mortgage, is not within Code, section 870, providing for the refunding to the taxpayer of any tax, or portion thereof, found to have been "erroneously or illegally exacted or paid."

Adjudication by Demurrer: CONSTRUCTION OF STATUTE. The provision of Acts Twenty-fifth General Assembly, chapter 86, that when a demurrer shall be overruled and the party demurring answers or replies, the ruling on the demurrer shall not be

(493)

considered as an adjudication of any question raised by the demurrer, applies to a case tried on its merits after the passage of such act, although the ruling on demurrer was made before its passage—GIVEN, J., dissenting.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

TUESDAY, JANUARY 19, 1897.

THIS action is against Polk county and its board of supervisors and treasurer, to recover five hundred and fourteen dollars and eighty-eight cents, taxes alleged to have been erroneously exacted from, and paid by, the plaintiff. By consent of parties the case was transferred to and tried in equity, and will be so considered on this appeal. Decree and judgment was entered against the plaintiff, from which she appeals.—*Affirmed.*

Guernsey & Baily for appellant.

W. G. Harvison and *James A. Howe* for appellees.

GIVEN, J.—I. Defendants demurred to plaintiff's petition upon several grounds, which, in effect, are that the matters alleged in the petition do not entitle the plaintiff to any relief. This demurrer was overruled, and the defendants answered that as to the truth of the matters alleged they had neither knowledge nor information sufficient to form a belief, and therefore denied the same. There is no controversy as to the facts of this case, and those shown on the trial are substantially as alleged in the petition. Plaintiff contends that the ruling on the demurrer was an adjudication that a sufficient cause of action was stated in the petition, and that, by answering, the defendants lost all right to object to the sufficiency of the facts alleged to entitle plaintiff to

recover. The demurrer was submitted prior to the taking effect of chapter 96, Acts Twenty-fifth General Assembly, taken under advisement, and ruled upon afterwards. That chapter provides: "When a demurrer shall be overruled, and the party demurring shall answer or reply, the ruling on the demurrer shall not be considered as adjudication of any question raised by the demurrer." Counsel dispute as to whether this chapter applied to the case at the times the demurrer was submitted and ruled upon, but the real question is whether it applied to the case at the time it was finally submitted. The statute is as to the remedy. It was in force when the case was decided on its merits, and said to the court, in unmistakable terms, that "the ruling on the demurrer shall not be considered as an adjudication of any question raised by the demurrer." In the absence of this statute, the court was not concluded by the ruling on the demurrer. See *Richman v. Supervisors*, 77 Iowa, 524 (42 N. W. Rep. 422).

II. The tax sought to be recovered in this case is the same as that considered in *Bibbins v. Clark*, 90 Iowa, 230 (57 N. W. Rep. 884), and (59 N. W. Rep. 290), and the facts alleged and proven are the same as therein stated. We need not restate these facts at length, but simply the following, which will be sufficient for an understanding of the questions to be considered: This tax upon the personal property of W. W. Clark & Co. became a lien upon certain real estate belonging to W. W. Clark, and, the tax not being
2 paid, the real estate was sold by the treasurer, and a certificate given to the purchaser. The plaintiff held a mortgage upon said real estate, subject to a prior mortgage to the Northwestern Mutual Life Insurance Company, both of which mortgages were liens upon said property prior to the time said tax became a lien thereon. Plaintiff foreclosed

her mortgage, and purchased the property at the execution sale, receiving the sheriff's certificate of the purchase. Thereafter, Clark having failed to pay the first mortgage, suit was brought to foreclose it. "Plaintiff, in order to obtain a renewal of said mortgage, and to prevent a foreclosure thereof and loss and expense therefrom, caused to be paid to the holder of said tax sale certificate the sum of \$457.23 being the amount necessary at that date to redeem from said tax sale, and caused said tax sale certificate to be assigned to the holder of said mortgage by whom said certificate was held as collateral, and additional security until August 15, 1892, when plaintiff caused redemption to be made from said tax sales; the amount necessary to redeem from said tax sale at said date being \$514.88." This claim was duly presented to the defendant board, and payment refused, whereupon, on March 21, 1894, and after *Bibbins v. Clark* had been reversed, this action was commenced.

III. Section 870 of the Code, under which this action is brought, is as follows: "The board of supervisors shall direct the treasurer to refund to the taxpayer any tax, or any portion of a tax, found to have been erroneously or illegally exacted or paid, with all interests and costs actually paid thereon, and in case any real property, subject to taxation, shall be sold for the payment of such erroneous tax, interest, or costs, as above mentioned, the error or irregularity in the tax may at any time be corrected as above provided, and shall not affect the validity of the sale, or the right or title conveyed by the treasurer's deed, if the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold, was levied, and the taxes were
§ not paid before the sale, and the property had not been redeemed from sale." In *Bibbins v. Clark, supra*, it was held that this tax was a lien upon

the real estate in question. Being a lien, the county did not act erroneously nor illegally in exacting payment, and has not received more than was legally due and owing to it. The question is whether the payment of this tax was "erroneously or illegally exacted or paid." It is not disputed that if plaintiff paid the tax voluntarily, without any obligation or necessity for so doing, she is not entitled to relief. It is contended on her behalf that because of the facts concerning the mortgages, and the sale of the entire property instead of Clark's equity therein, it became necessary for plaintiff to pay said taxes to protect her interests as a second mortgagee. In *Trust Co. v. Young*, 81 Iowa, 732 (39 N. W. Rep. 116), and (46 N. W. Rep. 1103), it was held by a majority of this court that a lien against real estate for taxes on personal property is entitled to priority over previous mortgage liens. This holding was overruled in *Bibbins v. Clark, supra*, the majority holding that the lien for taxes on personal property is not entitled to such priority.

4 The majority of the court as now constituted adhere to that conclusion, and therefore it must be accepted as the law. Applying this rule, it is clear that both mortgages were prior and superior to the lien for taxes, and therefore there was neither obligation nor necessity for the plaintiff to redeem from the tax sale to protect the mortgages. Plaintiff's mortgage had been foreclosed, and the property purchased by her, prior to the tax sale, and at that time plaintiff held the sheriff's certificate, from which W. W. Clark had the right to redeem. The tax sale was not of Clark's equity of redemption, but "of lots 2 and 3, Porter's sub-division," etc. Plaintiff contends that by this tax sale the purchaser took a new title, free from any incumbrance, claims or equities connected with the former title, and cites *Crum v. Cotting*, 22 Iowa, 411, as supporting this claim. In that case the

sale of the real estate was for taxes assessed against it, and not for tax on personal property, and the ruling is based upon the fact that such taxes are prior to all other liens. The lien for taxes on personal property not being prior to former liens, the rule announced in that case is not applicable. Under section 897 of the Code, a tax deed conveys "all right, title, interest and estate of the former owner in and to the land conveyed." The mortgages being prior liens, the sale for taxes was subject thereto, and therefore only of Clark's equity; hence there was neither obligation nor necessity for the plaintiff's redeeming from that sale.

IV. It appears that, prior to the redemption, suit was begun to foreclose the first mortgage, and that plaintiff desired to prevent that foreclosure, and to obtain an extension and renewal of that mortgage. That mortgagee refused to withhold foreclosure, or to extend the time for payment, unless the tax lien and sale were removed by redemption. It is in these facts that we have the real reason why plaintiff redeemed. The redemption was not to protect her lien, as against the tax title, for it was superior thereto, but to protect it from an immediate foreclosure of the first mortgage. Can it be said, as between the plaintiff and Polk county, that the redemption from the tax sale made under these circumstances and for these purposes was "erroneously or illegally exacted or paid?" We think not. In receiving the tax the county only got that which was due to it, and the plaintiff voluntarily paid it, without the county having exacted it from her. and with-

Clark, we held that the redemption was voluntary, and created no obligation upon them to reimburse the plaintiff. As to W. W. Clark, it is said: "It seems to us, that W. W. Clark is impliedly bound to reimburse the plaintiff for the amount she has expended in redeeming these lots from tax sale, with interest and costs. He knew these taxes were unpaid. He knew that they would in time become a lien upon these lots. The payment of these taxes, as we have said, was a matter of necessity for plaintiff, in order to preserve her lien. It was in no sense a voluntary payment. In paying these taxes she was not meddling with that which did not concern her. Clark was the owner of the lots. He owed it to the state and county to pay these taxes. As a mortgagor of plaintiff's assignor, he ought not to be permitted to take advantage of his own negligence in failing to pay these taxes, which were outstanding when he executed the purchase-money mortgage, and which, although technically not liens against the lots at the time that mortgage was executed, were nevertheless claims against Clark which would ripen into liens in due time, impairing the value of the security he had given plaintiff. We think, under all the facts of this case, plaintiff should recover from Clark." Plaintiff insists that, in so saying, this court decided that plaintiff was compelled to, and that it was necessary for her to, redeem to protect her interest and to preserve her lien. This language was used in considering the liability of W. W. Clark, from whom the taxes were due, and as to whom it might well be said the redemption was not voluntary, and that in paying these taxes the plaintiff was not meddling with what did not concern her. It did concern her that a foreclosure of the first mortgage should be prevented, and an extension secured, and to accomplish this, she had to pay the taxes for which W. W. Clark was liable, and had promised in the

mortgage to pay. No such relation existed between plaintiff and Polk county, and there being no necessity, under the rule of *Bibbins v. Clark*, for plaintiff to redeem to protect her lien, the redemption as to the county was purely voluntary, and the decree of the district court should be affirmed. The writer, while cheerfully acquiescing in the opinion of the majority in *Bibbins v. Clark*, is still of the opinion that the rule announced in *Young's Case* as to priority of liens, is the correct rule, and in harmony with the language of the statute and the intention of the legislature. I do not believe that the language of the statute requires, or that the legislature intended, that payment of taxes on personal property should be less secured to the state than taxes on real estate. The rule of the majority ignores the principle that, in return for taxation, the state gives protection, and renders it possible for lienholders, though receiving protection to the property upon which they depend, to defeat the state of its taxes. I fail to see the application of section 2882 as to judgment liens. The rights of the state to taxes legally levied are certainly different from those of a judgment creditor. Following the law as announced in *Bibbins v. Clark*, the decree of the district court is **AFFIRMED.**

STATE OF IOWA V. JOHN H. CATER, Appellant.

Evidence: LIMITING. Evidence on the effect of firing a pistol in close contact with and at a person, as to burning the flesh, or burning, or singeing the hair, should not be restricted to the effects, in that respect, from firing the pistol with which the alleged homicide is claimed to have been committed, but may include the effects of firing a pistol of the same caliber.

Cross-examination. The witnesses for defendant may be cross-examined as to statements made by them before the grand jury upon the examination of another charge against defendant, although the minutes of the testimony containing such statements were not returned with the indictment in the case at bar.

Same. The counsel for the state may, on the cross examination of a witness for defendant, use a copy of the minutes of her testimony taken upon the trial of another charge against defendant, for the purpose of showing that she had formerly made statements in conflict with those made upon the trial of the case at bar, and defendant cannot complain because the court did not stop the proceedings and furnish his counsel with a copy of the minutes.

RELEVANCE. The coroner may say that he told the sheriff in the presence of defendant about keeping defendant's shoes, the shoes being in evidence in connection with evidence as to tracks made by defendant.

Instructions: INCLUDED OFFENSES. Code, sections 4465, 4466, providing that on an indictment for an offense consisting of different degrees, the jury may find defendant guilty of a degree inferior to that charged, or of any offense necessarily included in that charge, does not apply where the facts show that defendant is either guilty of the crime charged or is innocent of any offense; hence the court need not charge as to the lower grades of the crime

PROVINCE OF JURY. An instruction in a murder trial, in which the defense is suicide, "that the drawing of the pistol shows premeditation; the cocking of it and leveling it at a particular vital spot, shows deliberation," and that the conclusion is irresistible that under the law and the undisputed facts in the case, the killing of deceased was an act possessing all the elements of murder in the first degree, and that it was murder in the first degree,—is erroneous, as it is a clear usurpation of the powers and province of the jury.

100	501
101	480
100	501
109	656
102	667
102	697
103	12
103	16
103	30
103	724
100	501
106	687
100	501
109	70
100	501
111	245
100	501
112	200
100	501
113	687
100	501
114	645
100	501
117	492
100	501
118	500
100	501
120	247
100	501
124	212
100	501
139	50

Same. An instruction in a murder trial, in which the defense is suicide, that the defendant sets up no affirmative defense and no matters in extenuation, and relies wholly upon the denial of his guilt, and wholly upon his anticipation of a failure by the state to
18 prove the case against him, is unfair in its phraseology, as it is calculated to impress the jury with the idea that, in the court's opinion, the defendant knows he is guilty, has no defense, but hopes to escape justice by reason of the inability of the state to show his guilt.

SAME. The jury should not be told to "follow your convictions" in
14 determining who is the guilty man.

APPLICABILITY AND CLEARNESS. An instruction in a murder trial defining malice aforethought, and stating that if the killing was accidental, or an excusable or justifiable homicide, or if it was only manslaughter, the party charged with the crime must prove
11 the facts in defense, or if he fails to do so, he must be a murderer, is erroneous where the only defense was suicide; as it is calculated to confuse the jury, and make them believe that the defendant must, in any event, make the proof referred to.

UNDERSCORING PARTS. The underscoring of words in the instructions submitted to the jury in a criminal trial, is improper, as its tendency is to give undue weight and force to the words or sentences
10 underscored, and thereby to prevent the jury from giving the other portions of the charge the weight and consideration which they should have.

Practice: NEW TRIAL: Criminal law. Newly discovered evidence
1 is not a ground for a new trial in a criminal case, under the Iowa statutes

OBJECTIONS. An objection to a question, not interposed until after
7 the answer, is not available, on appeal.

Miscellaneous: PROOF ON APPEAL. An assignment, on appeal, in a criminal case, that the court erred in not rebuking or denouncing the clapping of hands of the audience, claimed to have followed the conclusion of the argument of one of the counsel for the state,
4 cannot be deemed well taken where the counsel for defendant swear that such act of the audience was not stopped or rebuked by the court or the sheriff, but the sheriff states in his affidavit that he instantly checked the applause, and the clerk swears that

Appeal from Winneshiek District Court.—Hon. E. E. COOLEY, Judge.

TUESDAY, JANUARY 19, 1897.

THE defendant is charged with the murder of George Wemett. He was tried, found guilty, and sentenced to be imprisoned for life in the state penitentiary, and appeals.—*Reversed.*

John B. Kays and J. J. Cameron for appellant.

Milton Remley, attorney general, E. P. Johnson, county attorney, and Jesse A. Miller for the state.

KINNE, C. J.—I. The court is charged with error in not sustaining the defendant's motion for a new trial on the ground of newly-discovered evidence.

Under the statute, newly-discovered evidence is
1 not ground for granting a new trial in a criminal case. *State v. King*, 97 Iowa, 440 (66 N. W. Rep. 735); *State v. Watson*, 81 Iowa, 380 (46 N. W. Rep. 868); *State v. Whitmer*, 77 Iowa, 557 (42 N. W. Rep. 442); *State v. Bowman*, 45 Iowa, 418.

II. Complaint is made of the action of the court in permitting the attorneys for the state, on cross-examination of the defendant's witnesses, the Cater
girls, to examine them regarding certain state-
2 ments made by them before the grand jury. It is urged that the ruling was wrong, because the minutes of the testimony containing such statements were not returned with the indictment in this case. The statements complained of were not made in this case by said witnesses, but were made in the case of the state against this defendant, in which he was charged with the murder of his wife. The testimony,

therefore, could not be with the indictment in this case. There was no error in the ruling.

III. It is alleged that counsel for the state, in an argument to the jury, stated his belief in the defendant's guilt, and that is said to be error. We discover nothing in the record to show that the state-
8 ment complained of was made, and if it was, it was not error. *State v. Beasley*, 84 Iowa, 83 (50 N. W. Rep. 570).

IV. The court is said to have erred in not rebuking or denouncing the clapping of hands of the audience, which is said to have followed the conclusion of the argument of one of the counsel for the state. Counsel for the defendant swear that this act of the audience was not stopped, or rebuked by the
4 court, or the sheriff. On the other hand, the sheriff states in his affidavit that he instantly checked the clapping of hands. The clerk swears that both the court and the sheriff immediately stopped the clapping of hands, and the county attorney says it was at once stopped. In view of this condition of the record, it cannot be said that there was any error.

V. In the instructions the court told the jury that if the defendant was guilty of any crime he was guilty of murder in the first degree. He submitted to the jury forms of verdict, accordingly. No instructions were given touching any lower degree of crime.

Counsel refer to the statute, Code, sections 4465,
5 4466. These sections provide that upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior

when the facts show that the defendant is either guilty of the crime charged or not guilty, and that in such a case it is not incumbent upon the court to charge as to the lower grades of crime. *State v. Cole*, 63 Iowa, 695 (17 N. W. Rep. 183); *State v. Froelick*, 70 Iowa, 213 (30 N. W. Rep. 487); *State v. Casford*, 76 Iowa, 390 (41 N. W. Rep. 32); *State v. Munchrath*, 78 Iowa, 268 (43 N. W. Rep. 211); *State v. Perigo*, 80 Iowa, 37 (45 N. W. Rep. 399); *State v. Sterrett*, 80 Iowa, 609 (45 N. W. Rep. 401); *State v. Sigg*, 86 Iowa, 746 (53 N. W. Rep. 261). It is manifest that in this case, if the defendant is guilty, it is of the crime of murder in the first degree.

VI. Coroner Gibson testified for the state touching a conversation had with the sheriff, in the presence of the defendant, relating to what was said to the sheriff as to keeping the defendant's shoes, and as to who had since retained possession of the shoes. There was no error in this. The shoes were introduced in evidence in connection with evidence relating to the tracks.

VII. Certain evidence of Dr. Emmons, to the effect that Wemett did not have a coat on when he and the doctor were together the evening prior to the killing, is complained of as not proper cross-examination. The record shows that no objection was made to the question when asked. The objection was made after the question had been answered. The defendant could not sit by and permit this evidence to be given without objection, and then, if he deemed it unfavorable to him, interpose an objection. *State v. Moore*, 25 Iowa, 128; *State v. Bengé*, 61 Iowa, 658 (17 N. W. Rep. 100).

VIII. It appears that the counsel for the state, on the cross-examination of Lizzie Cater, used a copy

the murder of her mother, for the purpose of showing that she had formerly made statements in conflict with those made by her upon the trial of this case. We see no proper objection to such use of the minutes. It was proper to show that she had made statements at another time and place different from what she was then testifying to, and the minutes could be used for that purpose. No attempt was made to introduce them in evidence. Nor can the defendant complain that the court did not stop the proceedings, and furnish the defendant's counsel with a copy of said minutes.

IX. Another assignment of error we deem it necessary to discuss is as to the court's ruling excluding the testimony of Dr. Roome, with reference to the fact that a pistol fired in close contact with a person, and at him, might not burn the flesh, or burn or singe the hair. The objection of the state to the questions was not that the doctor was not shown to be competent to give such an opinion as was asked for. The objection, which was sustained, was that the evidence was immaterial, incompetent, and irrelevant, unless it was shown that it was the same weapon that was found by the body of the deceased in this case. If it had been objected to because the weapon asked about was not shown to have been of the same caliber, it might have been good. But to limit the inquiry to the particular revolver found by the side of the deceased, was clearly error. The attempt of the defense was to show that Wemett came to his death by a shot from his own hand, and it was proper to show the effect of a revolver shot upon a person, as

to the objection in fact made, the ruling was erroneous.

X. Before considering the objections addressed to other instructions given, and the alleged error in refusing to give instructions asked, we must set out as briefly as may be the more important facts as to the killing of Wemett, as to which there was evidence introduced upon the trial. Burr Oak, is a small village in Winneshiek county, and is situated about thirteen miles from the county seat. The defendant lived in the village, owned and operated a butcher shop and meat market, and peddled meat in the country surrounding the village. George Wemett had been in the employ of the defendant in his business until a week or two prior to September 1, 1894. After he had ceased to work regularly for the defendant, he kept his clothes at the defendant's house, but did not board there. He also assisted the defendant occasionally after his regular employment had ceased. Wemett was about twenty-six years old, weighed one hundred and eighty pounds, was in good health, generally of cheerful disposition, not quarrelsome, and not known to have any enemies. He used alcohol and other intoxicants, more or less, as a beverage; often carried a bottle of it in his pocket; was considerable of a coward, and usually carried a revolver. He had for a time prior to his death been keeping company with a daughter of the defendant, which association was objectionable to the defendant, because of Wemett's habits as to the use of liquor. Defendant's wife seems to have stood by the daughter, and it also appears, that because thereof, and because of the attempt of the defendant to dispose of some property, he had had some trouble with his wife. Wemett was found dead near the schoolhouse on the morning of the second of September. There was a bullet hole in his head behind his ear, a revolver lying by

him, and a bottle of alcohol in his hip pocket. The evening before, Dr. Emmons called at the defendant's house for Wemett, and he rode three miles or over in the country with him. They both returned to the village, and to the doctor's place, at about 8 o'clock, and Wemett helped unhitch the team, and run the buggy in the barn. Wemett then left. He had not been drinking. He was seen to go from the doctor's place towards the post-office, and shortly after was in a store with the defendant. About half past 8 o'clock he was seen outside of and near the same store. He then had no coat on, had not been drinking, and did not appear to have any bottle of liquor or revolver about his person. Soon after, he made inquiry of a man for the defendant, wanted to know where he was, and this was the last seen of him until his dead body was found the next morning. The defendant was seen the same evening at a store at 8 o'clock, and again at about half past 8 o'clock. At about fifteen or twenty minutes to 9 o'clock he was seen walking in the direction of the schoolhouse. It was about forty rods from the point where the defendant was last seen walking towards the schoolhouse, to the place where the body of Wemett was found. It appears also that the defendant was looking for Wemett after the latter returned to the village with Dr. Emmons. At about fifteen minutes after the defendant was seen going towards the schoolhouse, several witnesses testify that they heard a shot in the direction of the schoolhouse. About half past 9 o'clock the defendant was in a store, and was still inquiring for Wemett. When asked if anything was the matter he said that his wife and Wemett had gone to one Landon's. About 9:30 p. m. he went to a store, and

At his request the daughter went to the barn, to see if the horses and buggy were there. He went to see if Emmons' horse and buggy were home. He saw the doctor, and told him he had been having some trouble with his wife about the sale of some property. Afterwards he was at the store, and asked if anyone had seen Wemett, whereupon one Briggs, not knowing that Wemett was then dead, jokingly said, "George Wemett died a half hour ago." The defendant dropped his hands, and turned out of the light, and called one Ward out of the store. He told Ward his wife and Wemett "had skipped out;" that his wife was mad about his selling a part of a lot to one Manning, and that she said she was going to see Landon about it, and he believed she and Wemett had gone there. Defendant then went to the home of Joe Wemett, and told him the story of his wife's going off with George Wemett. Later on defendant and several others made a search of defendant's barn. About half past twelve that same night defendant came out from under the trees near his house. There was no light in the house. The next morning about 6 o'clock the defendant called his daughter. She asked if he had seen anything of her mother and Wemett, and defendant said "No," and he was going to Wemett's to see if they were there. Before starting, he handed his keys to the daughter, and asked her to feed the horse. The daughter and her sister opened the barn door, and saw the feet of their mother sticking out from under some hay. She had been killed by some one. When told by his daughter that the mother was in the barn, under some hay, he said, "Is she?" He got a man to go to the barn with him. There lay the dead body of his wife, covered with blood, and an ax was lying near the body. He admitted that he had trouble with his wife. He then said that he believed that Wemett had killed his wife. This was before Wemett's body had

been discovered. When the fact that Wemett's dead body had been found was communicated to him, he said nothing, and exhibited no feeling. Blood spots were found near Wemett's body; also some blood a short distance from the body. Some of the evidence tended to show that death was instantaneous. Tracks were found in the dust and dirt, which led to the place where the body was found. It appeared that they were made by two persons. The defendant's shoe was compared with the tracks, and the shoe had holes in it, and an impression of it in the dust was like that made by the track. The defendant afterwards admitted that he and Wemett were up there by the schoolhouse on the night prior to that on which the killing took place. There was evidence which tended to show that prior to the making of the tracks we have spoken of, and after the time defendant claims he and Wemett were up there, a large drove of cattle had been driven over the identical place. The revolver lying near the dead man was shown to have been in the drawer of the defendant's shop a day or two before the killing, and the drawer was locked, and the key in the defendant's possession. The circumstances surrounding the finding of the body of the wife indicated that she had not been killed in the barn where found. Indeed, the evidence showed clearly that the body was not there when the search was made near midnight.

XI. The record in this case shows that many words in the various instructions are underscored, thus calling the attention of the jury more particularly to them. This is improper, and we speak
10 of it here so that it may not be done hereafter.
The tendency of it is to give undue weight and

XII. The fifth instruction is assailed as erroneous, and it is expressly complained of as ignoring the theory of the suicide of Wemett. The law touching the theory of suicide is fully covered by other instructions. This instruction defines malice afore-
11 thought, and in closing says: "And it devolves upon the perpetrator of the act, if he would shield himself from the legal consequences, to rebut by evidence the presumption against him that the law raises. If the killing was accidental, or an excusable, or a justifiable homicide, or if it was only what is termed manslaughter, the party charged with the crime must prove the facts in defense; or, if he fails to do so, he must be a murderer. The *presumption* of killing *with intent to kill* remains until it is rebutted by competent proof." The underscoring appears in the instruction as it was given by the trial judge. It is said that the instruction is open to the objections that it refers to an accidental, or justifiable homicide, and that no such question was involved in the case. That is true, and in incorporating such statements in the charge the court was in error. In view of the real and only defense,—suicide,—the instruction, we think, in other respects was hardly proper, and was calculated to work prejudice to the defendant. By this instruction matters are injected into the case which are foreign to any issue presented, and the jury are told that in the case stated the one charged with the crime must "prove the facts in defense, or, if he fails to do so, he must be a murderer." The effect of this may have been to divert the minds of the jury from the real issue, and to confuse them; and in any event, it was uncalled for, and improper.

XIII. The errors assigned to the eleventh and twelfth instructions will be considered together. The jury was told that "the drawing of the pistol shows premeditation; the cocking of it, leveling it at a

particular vital spot, shows deliberation." In the way in which this language is used in connection with the following instruction it was about equivalent to telling the jury that the defendant did the drawing, cocking, and leveling the pistol the discharge from which killed Wemett. It cannot be said that its effect was simply to illustrate a certain legal principle, no matter what the court may have intended, for it is not *any* pistol which the court is speaking of, but *the* pistol, presumably meaning the weapon the discharge from which caused Wemett's death. And the court told the jury that: "The conclusion is irresistible that under the law, and the undisputed facts in this case, the killing of George Wemett was an act possessing all the elements of murder in the first degree, as defined by our statutes. It *was* murder in the first degree. It is nothing less." It is true that in another instruction the law touching Wemett's death by suicide is given to the jury; still in the instruction under consideration, the court steps in, and relieves the jury from the duty which the law casts upon them, of determining from the evidence the guilt or innocence of the defendant, and the degree of crime, if *any*, of which he is guilty, and broadly and in the most positive language tells the jury that Wemett *was* murdered. The jury must have been impressed with the conviction, from the reading of this instruction, that under the direction of the court it was their duty to find the defendant guilty of murder in the first degree. It is so sweeping as to leave nothing for their consideration save the mere formal matter of returning a verdict of guilty of murder in the first degree, and fixing the punishment therefor. Under our law and system of procedure, the trial judge has no right to weigh the evidence for the jury, and direct them as to what they shall find from the facts in the evidence. A clearer case of usurpation of the powers and

province of the jury will hardly be found. If trial judges may thus arrogate to themselves the duty of jurymen, there would be little use having a jury, and the life and liberty of the citizen would be in the keeping of one man. The instruction settled, in advance of the jury's retiring for deliberation, the fact that Wemett did not die by his own hand; thus entirely depriving the defendant of the consideration by the jury of the only defense in the case. There can be no question that it was erroneous, and highly prejudicial.

XIV. In the fourteenth paragraph of the charge of the court, the jury was told that: "The defendant here sets up no affirmative defense, and no matters in
13 extenuation. He relies wholly upon the denial
of his guilt, and upon his anticipation of a failure by the state to prove a case against him."

It occurs to us that the thought of the instruction is that the defendant knows he is guilty, has no defense, but hopes to escape justice by reason of the inability of the state to show his guilt. The instruction impresses us as pregnant with insinuation of the guilt of the defendant, and manifestly unfair in its phraseology.

XV. In the twelfth division of the charge to the jury it is said "follow your convictions" in determining whether or not the defendant is the guilty man.

It is urged that this was an invitation for the
14 jury to ignore the evidence and the law, and
convict the defendant, if they felt so inclined.

Taking the whole instruction together, it is not open to the criticism made, though on a re-trial it would be well to so change the phraseology as to avoid such an objection.

XVI. Other instructions are complained of, but we do not think they need special consideration. It may be proper, however, to say that the charge in this

case is not one which it would be advisable to follow upon another trial. Without referring to particular instructions, it may be said that there is a vein of assumption, argument, and denunciation running through several of the instructions given which cannot be approved, and which should be avoided upon another trial.

XVII. Complaint is made of the refusal of the court to give instructions 2 and 4 asked by the defendant. They relate to the rule for determining questions of fact from circumstantial evidence, and to the effect of circumstances in evidence which may tend to show that Wemett committed suicide. While it may not have been improper to have given these instructions, still, in view of those given touching the same matter, we cannot say that it was error to refuse them.

XVIII. Finally, it is contended that the verdict is not warranted by the evidence. In view of another trial, it is not proper for us to discuss the weight and sufficiency of the evidence. This is an important case to the state and to the defendant. From our investigation of this record we are thoroughly satisfied that the defendant did not have the fair and impartial trial which the law guaranties to all persons charged with the commission of a crime. For the reason, heretofore given, the judgment below is REVERSED.

FRANK SCHLUTTER, Appellant, v. BERTHA DAHLING,
Executor of the Last Will and Testament of
GEORGE DAHLING, Deceased.

100	515
117	530
100	515
123	658

Estates of Decedents: CLAIMS: Statute of limitations. Under Code, section 2421, requiring claims against a decedent's estate to be
1 filed within twelve months after notice by the administrator,
unless the claim is pending in the district court, the pendency of
2 a suit, which on the death of a decedent is not revived against his
representatives, but is dismissed as to him, before the expiration
of the twelve months, does not toll the statute.

CLAIM: Equitable relief. "Peculiar circumstances," entitling a
claimant against a decedent's estate, to equitable relief against
the bar of the statute, for failure to file his claim within twelve
months (Code, section 2421), are not shown by the fact that a
1 stranger to the settlement of the estate, who was also liable on the
claim, represented to claimant that decedent's widow, who was also
liable, was decedent's sole devisee, and that she would give him
additional security, and that prior liens against land mortgaged by
2 decedent, to secure the claim, would be paid off, by reason of which
representations claimant forebore filing the claim,—at least, where
he made no investigation of the condition of the estate for more
than six months, and where said statements and promises were
made without the authority of the widow.

Appeal from Jackson District Court.—HON. A. J. HOUSE,
Judge.

TUESDAY, JANUARY 19, 1897.

PROCEEDINGS in equity to establish a claim against
the estate of George Dahling, deceased. The execu-
tor demurred to the petition, and the demurrer was

DEEMER, J.—Plaintiff's claim was not filed and proved within twelve months from the giving of the notice by the executrix, required by law, but she claims there are such peculiar circumstances in the case as to entitle her to equitable relief. The statute bearing upon the subject is as follows (Code, section 2421): "All claims of the above classes not filed and proven within twelve months of the giving of the notice aforesaid are forever barred, unless the claim is pending in the district or supreme court, or unless peculiar circumstances entitle the claimant to equitable relief." The facts upon which she relies are as follows: In the year 1891, the deceased and Bertha and William Dahling executed to plaintiff their promissory note for the sum of one thousand two hundred dollars, and, to secure the payment of the same, George and Bertha Dahling executed a mortgage upon a lot in the town of Leeds, Woodbury county, Iowa. On the twenty-fourth day of September, plaintiff brought an action in the district court of Woodbury county, to enforce the note and foreclose the mortgage. The makers of the note represented to plaintiff, at the time they executed the mortgage, that the premises were free and clear of incumbrance, whereas, in truth and in fact, there was at that time, an unsatisfied mechanic's lien thereon for the sum of three hundred dollars. After the commencement of the foreclosure action, the Dahlings, above named, in consideration of an agreement on the part of plaintiff to continue his suit, promised and agreed to pay all interest due on the note, and also to pay the mechanic's lien, on or before March 1, 1893. Relying upon this promise, plaintiff continued his suit. On the

attorney for plaintiff, that Bertha Dahling was the sole devisee under the will of the deceased. In order to receive a further continuance of the suit, Bertha Dahling, on the fifth day of July, 1893, entered into a written agreement with the plaintiff, by the terms of which she agreed to pay on the principal note the sum of two hundred dollars on the first day of September, and two hundred dollars on or before the first day of November, 1893. Bertha Dahling failed to keep her agreement, and, as an excuse therefor, William Dahling informed plaintiff's attorney that Bertha was negotiating a sale of the property devised to her by will; and that, upon effecting such sale, the entire indebtedness of plaintiff would be paid, and also promised the attorney that Bertha would execute a mortgage upon a brick building in the town of Maquoketa, worth about three thousand three hundred dollars, over and above all incumbrances, as additional security for the original note; and the said William Dahling further agreed to furnish the attorney with an accurate description of the property, in order that a mortgage might be written thereon. Pursuant to his promise, William furnished the description of the property, and accepted from the attorney a mortgage containing the description given, for the purpose of having Bertha sign the same, but, instead of so doing, he retained it until April, 1894, and then returned it, with a statement that Bertha Dahling refused to execute it, or to secure the indebtedness. Bertha Dahling failed to meet the payments called for by her contract: and on the fourteenth day of January, 1894.

March, 1894, the mechanic's lien claimants secured judgment on their account, and afterwards, and on the fourteenth day of May following, sold the premises mortgaged to plaintiff for the sum of two hundred and forty-eight dollars. The premises so mortgaged were owned by George Dahling at the time of his death, and are not worth to exceed five hundred dollars. William Dahling is insolvent, and Bertha has no property except that devised under the will of George Dahling. As a matter of fact, Bertha Dahling received, under the will of the deceased, but a life estate in the property owned by him, the remainder being disposed by will to the children of George Dahling. But plaintiff did not learn of this fact until July 18, 1894, at which time he caused the records to be searched, to learn the exact condition of affairs. Bertha Dahling was appointed executrix of the estate of George Dahling, March 14, 1893, and gave notice of her appointment, as required by law, on the twenty-fifth day of March, 1893. Plaintiff claims that he relied upon the representations and statements made by William Dahling with reference to the condition of the estate, and his promises regarding the execution of the further mortgage, and also believed that his judgment was a valid lien upon the real property devised by the deceased, and that he did not, for this reason, file his claim within the time allowed by law. The estate of George Dahling remains unsettled, and it has assets to the amount of four thousand dollars, and liabilities amounting to but one thousand dollars.

I. Appellant's first contention is that his suit

as to George Dahling, on the thirteenth day of January, 1894, and elected to pursue his remedy against the mortgaged property and Bertha Dahling. The time for filing claims against the estate, expired on the twenty-fifth day of March, 1894, and plaintiff dismissed his action against the deceased more than two months before this date. Consequently, there was no suit pending at the expiration of the year for filing claims. We do not think that the suit commenced in Woodbury county is, under the facts recited, sufficient to relieve the plaintiff from the bar of the statute.

II. Appellant's next contention is that he is entitled to equitable relief, because of the peculiar circumstances of the case. It will be observed that the principal facts upon which the plaintiff
8 relies, are statements made by William Dahling with reference to the property devised to and owned by Bertha Dahling, and as to what she would do with reference to paying or securing plaintiff's claim. He does not claim that the executrix made any promises, either in her individual or representative capacity. Nor is it claimed that William in any manner represented the executrix in his statements or agreements. There is no claim that William had any connection with the management or settlement of the estate, or that he was authorized to speak for any one but himself. His representations, statements, and promises were of no more efficacy than those made by any stranger to the transaction. Appellant does not claim that William Dahling did or said anything to induce him not to file his claim against the estate. It seems quite clear that he concluded to

of George Dahling; and he did not commence this action until the tenth day of August, 1894. The statute we have quoted, requires diligence of creditors in filing and proving their claims against the estate of one deceased, and yet, as stated in the case of *Brewster v. Kendrick*, 17 Iowa, 479, "there may be cases (and the section above quoted recognizes them) when the delay shall not operate as an absolute bar, and when to deny the creditor relief would be manifestly inequitable and unjust. Negligence, however, can never afford a passport to the relief contemplated by the statute." We have uniformly held that "one claiming exemption from the bar of this statute must show the exercise of proper diligence." *Lacey v. Loughridge*, 51 Iowa, 629 (2 N. W. Rep. 515); *Roaf v. Knight*, 77 Iowa, 506 (42 N. W. Rep. 433). It seems to us that plaintiff was negligent in not ascertaining the condition of the estate, the provisions and conditions of the will of the deceased, and all other matters necessary to enable him to determine upon what he would rely. Common prudence would have suggested such a course, rather than a reliance upon statements made by a stranger to the settlement of the estate. In the case of *Roaf v. Knight*, *supra*, we held that the claimant was not justified in relying upon statements of a non-resident attorney as to the time when a claim should be presented. It also appeared in that case that the plaintiff knew who the administrator was, and that she had such information as induced her to believe it would be necessary to employ counsel to

given notice of her appointment. If it should be conceded that the statements and promises made by William Dahling were binding upon the defendant, yet we are not prepared to hold that plaintiff is entitled to equitable relief. In the case of *Colby v. King*, 67 Iowa, 458 (25 N. W. Rep. 704), we held that although the plaintiff, who had a chattel mortgage to secure his note, believed that the property was sufficient to pay his claim, and notwithstanding the executor promised to see him paid, yet he could not recover because of his neglect in prosecuting the claim. These cases from which we have quoted seem to rule the one at bar, and the judgment is AFFIRMED.

FRANK WALTERS V. W. C. BLAKE AND ELLEN BLAKE,
Appellants.

Original Notice: DEFAULT: *Second term.* Defendant served with original notice less than ten days before the first day of the term, at which the notice requires him to appear, must appear at the next term thereafter, under Code, section 2602, and judgment by default may be entered against him, in case of his failure to do so.

Appeal from Cedar Rapids Superior Court.—HON. T. M. GIBERSON, Judge.

TUESDAY, JANUARY 19, 1897.

THE original notice was served November 23, 1894, requiring defendants to appear at the December term, beginning December 3. At the following term, judgment by default was entered, and thereafter a motion to set aside such judgment was overruled and

LADD, J.—The defendants were not served in time for the December term of court, only nine clear days intervening between the service of the notice and the first day of such term. They question the jurisdiction of the court to enter default on this service at the following term. Section 2599 of the Code relates to the manner of beginning actions, and provides, among other things, that the notice shall name the term at which the defendant is required to appear. Section 2602 has reference to the time of the service. The defendant, if served, within the county where the suit is brought, ten clear days before the first day of the next term, shall be held to appear at such term. "If not so served, he shall be held to appear at the second term after service." The language of these sections is so plain that discussion tends to obscure, rather than to elucidate, its meaning. If notice is served before, but not in time for the term named therein, the defendant must appear at the next term thereafter, or judgment by default may be entered against him.—AFFIRMED.

E. L. FOOT v. MARY BUSH, Administratrix, Appellant,
DAVID VAN VORS, Intervener.

Specific Performance: DEFAULT OF CONTRACT. A purchaser is not

Appeal from Buchanan District Court.—HON. J. J. TOLERTON, Judge.

TUESDAY, JANUARY 19, 1897.

ACTION to enforce the performance of a contract to convey land. Decree for plaintiff, and the defendant appealed.—*Reversed.*

Ransier & Everett and *Lake & Harmon* for appellant.

E. E. Hasner for appellee.

GRANGER, J.—The defendant is the widow and administratrix of the estate of A. M. Bush. On the seventeenth day of February, 1892, Bush and the plaintiff entered into an agreement for the conveyance by Bush to plaintiff of a lot of land in Buchanan county, for the agreed price of one hundred and twenty dollars, twenty dollars of which was paid in hand. The remaining one hundred dollars was to be paid, fifty dollars August 17, 1892, and fifty dollars February 17, 1893, with interest at eight per cent. The following is a provision of the contract: "And it is expressly agreed, by and between the parties hereto, that the time and times of payment of said sums of money, interest, and taxes, as aforesaid, is the essence and important part of the contract, and that, if any default is made in any of the payments or agreements above-mentioned to be performed by the party of the second part, in consideration of the damage, injury, and expense thereby resulting, or that may be incurred by or to the party of the first part thereby, the agreement shall be void and of no effect — the party of the

above-mentioned real estate, nor any part thereof, and any claim, or interest, or right, the party of the second part may have had hereunder, up to that time, by reason hereof, or of any payments, or improvements, made hereunder, shall, on all such default, cease and determine, and become forfeited, without any declaration of the forfeiture, re-entry, or any act of the party of the first part. And if the party of the second part, or any other person, or persons, shall be in possession of said real estate, or any part thereof, he, or they, will peaceably remove therefrom, or, in default thereof, he, or they, may be treated as tenants holding over unlawfully after the expiration of a lease, and may be ousted and removed as such." No payments were made and Bush served plaintiff with a notice to quit said premises for a failure to perform the contract. The date of this notice does not definitely appear, but we understand it to have been given some time in July, 1893. The intervener is a judgment creditor of plaintiff, and, before judgment, he levied on the premises by attachment, because of which he claims an interest; but his rights are wholly dependent on the merits of plaintiff's claim to title. Defendant, to avoid the legal effect of his failure to pay as required by his contract, pleaded a waiver on the part of Bush, to the effect that he said that he did not need the money, and led plaintiff to believe that he could pay at any time. Plaintiff had improved the land, and there are averments and proofs as to the possession of the house after the notice to quit, which, in view of the record, are immaterial. There is no claim, nor could there be, that plaintiff is entitled to a decree, unless the waiver is established. If all the testimony could be considered, it fails to meet the averments of the petition as to waiver. Not a word uttered by Bush ought fairly to be construed as intending a waiver. It is pleaded that he said he

did not need the money, which would tend quite strongly to support the plea of waiver. There is not a word of proof to that effect. The only inference from plaintiff's testimony is that he did not pay because he had not the money, and Bush did not ask for it, and he supposed he did not want it. But this evidence was taken under objection as incompetent, under Code, section 3639, because given by plaintiff, and Bush was deceased, and the defendant his administratrix. Take from the record such evidence as is incompetent under that section, and there is no basis whatever for a claim of waiver. The proofs do not in any way sustain the averments as to waiver. There should be a decree for defendants.—REVERSED.

HARRIET J. HEIPLE, *et al.*, Appellants, v. ELIZABETH
MCGEE REINHART.

Construction of Lease: FORFEITURE. Effect is to be given to both the written and printed provisions of a contract, where they are consistent with each other, and a printed clause in a lease, providing that a failure on the part of the lessee to perform any of the covenants therein contained, shall authorize a re-entry and recovery of the premises by the lessor, applies to a written provision that the lessee shall pay all taxes on the property before they become delinquent, although a written provision as to forfeiture for certain breaches might not, if considered alone, be held to refer to such agreement.

CONSTRUCTION OF CONTRACT. The intent of the parties to a contract is ordinarily determined by the language they use, and if that is definite, certain and complete, it must control.

Forecible Entry and Detainer: PEACEFUL POSSESSION: *Notice to quit.* Under Code, section 3621, providing that "thirty days peaceable

100	525
109	575
100	525
132	270
100	525
d139	309
f142	492

Construction of statute. The "knowledge of the plaintiff," referred to in Code, section 8621, is the knowledge of the defendant's possession, and not of the fact that a cause of action to terminate possession has accrued.

Appeal from Black Hawk District Court.—HON. A. S. BLAIR, Judge.

TUESDAY, JANUARY 19, 1897.

ACTION of forcible entry and detainer. A trial by jury was had in justice's court, which resulted in a verdict for the defendant, and a judgment in her favor for costs. An appeal was taken to the district court of Black Hawk county. In that court the plaintiffs struck from their petition certain averments, and the defendant filed a demurrer to the petition as thus amended. The demurrer was sustained, and, the plaintiffs refusing to plead further, judgment was rendered in favor of the defendant. The plaintiffs appeal.—*Affirmed.*

F. C. Platt for appellants.

Reed & Tuthill for appellee.

ROBINSON, J.—On the sixth day of January, 1887, Harriet J. Heiple, Phebe E. Parsons, and Wesley S. Reed entered into an agreement in writing with the defendant by which they leased to her, certain premises in an addition to the city of Waterloo, to be used for the purpose of a dwelling house. The lease took effect on the day it was made, and was to continue "for the term of the natural life" of the lessee. As rent for the premises, she agreed to sell and quit-claim

expressly agreed that, if default shall be made in the performance of any of the covenants herein contained, then it shall be lawful, at any time after such failure, for the said party of the first part to re-enter said premises, and to remove all persons therefrom, after giving three days' notice to quit said premises, hereby waiving all legal or statutory notice to the contrary notwithstanding." Then followed covenants for the use of the property, for preserving and keeping it in repair, and for its surrender at the expiration of the lease or upon a breach of the covenants specified. After that portion of the lease were written the following provisions: "As a further consideration, the said Elizabeth McGee Reed (now Reinhart) hereby expressly agrees to pay all taxes or assessments which may be entered or assessed against said premises, and to pay the same before they become delinquent; and further agrees to keep up all reasonable repairs upon said premises and the buildings thereon at her own expense, and a failure to do so shall work a forfeiture of this lease, and shall be considered a default thereof." The petition alleges, and the demurrer admits, that the defendant has failed to pay the taxes levied upon the leased premises for the years 1892 and 1893, and has permitted the premises to be sold for taxes; that on the twenty-eighth day of April, 1894, the plaintiffs caused to be served upon the defendant, a notice to surrender to them within the three days the leased premises, for the failure to pay the taxes thereon, before they became delinquent. The defendant refuses to sur-

I. The first ground of the demurrer is as follows: "The lease shows on its face, that it does not provide for a forfeiture to pay the taxes before they become delinquent. No forfeiture can be declared unless it is expressly stipulated in the lease that right of re-entry or right to declare a forfeiture is reserved on breach of the contract." It is urged in support of this ground of the demurrer that a forfeiture is not favored in law, and will not be declared unless the person claiming it shows clearly that he is entitled to it. This may be admitted, and we are then required to determine whether the lease clearly gives the right of forfeiture, if the lessee permits the taxes levied on the leased premises to become delinquent. It is an elementary rule of construction, that all parts of a written contract must be construed together, and
2 force and effect given to each, where that is practicable. The intent of the parties to a contract is ordinarily determined by the language they use, and, if that is definite, certain, and complete, it must control. *Emerick v. Clemens*, 26 Iowa, 335; *Greene v. Day*, 34 Iowa, 333. Our statute provides that, when an instrument consists partly of written and partly of printed form, the former controls the latter when the two are inconsistent. Code, section 3651. That provision does not apply in this case, for the reason that the written portion of the lease in question
3 is not inconsistent with that which is printed. If the two provisions in writing were alone considered, it might reasonably be inferred from their arrangement and the language used, that the forfeiture provided for in the second paragraph, had no application to a failure to pay the taxes as required by the first paragraph. They are separate and independent provisions. But the printed portion of the

the performance "of any of the covenants" contained in the lease. That applies as well to the agreement to pay taxes as to any other, and authorizes a termination of the lease for default in their payment. We conclude that the first ground of the demurrer was not well taken.

II. We have seen that the lease requires the defendant to pay all taxes levied on the leased premises before they become delinquent, and provides that "a failure to do so shall work a forfeiture of this lease, and shall be considered a default thereof," and that

the defendant failed to pay the taxes levied on
4 the premises for the years 1892 and 1893. The

defendant was served, on the twenty-eighth day of April, 1894, with a notice to surrender the possession of the leased premises within three days, and that in case of her refusal an action of forcible entry and detainer to recover such possession would be commenced against her. This action was commenced on the second day of the next month. The second ground of the demurrer is, in substance and effect, that the action is barred by section 3621 of the Code. The action was brought under section 3611 of the Code, which contains the following: "A summary remedy for forcible entry or detention of real property is allowable: * * * (2) Where a lessee holds over after the termination, or contrary to the terms of his lease. * * *" Section 3621 provides that "thirty days' peaceable and uninterrupted possession, with the knowledge of the plaintiff, after the cause of action accrued," is a bar to the proceeding. The appellants contend that the taxes for the year 1893 were not delinquent till the first day of April, 1894; that the notice to quit was a commencement of this action, and therefore it was commenced within thirty days from the time when the cause of action accrued. For the purposes of this appeal, it may be conceded that the

taxes for the year 1893 were not delinquent until the first of April, 1894, but more than thirty days elapsed from that time until this action was commenced, on the second day of May. The notice to quit was required to be served three days before bringing the action (Code, section 3614), and could not, therefore, have been the commencement of the action. It did not require the defendant to surrender the premises until the thirty days contemplated by section 3621 had expired, and the possession of the defendant was peaceable and uninterrupted, within the meaning of that section, for thirty days before this action was commenced. The petition does not show when the plaintiffs discovered the non-payment of the taxes, but the knowledge to which the statute refers is the thirty days' peaceable and uninterrupted possession, and not the accruing of the right of action. For the purposes of the action of forcible entry and
5 detainer, a landlord is presumed to know whether his real property in the possession of another is held rightfully or not; and if the possession is peaceable and uninterrupted for thirty days, with the knowledge of the landlord, his right to that action is barred, even though he may not, in fact, have known that the right of possession had ceased to exist by reason of the breach of a covenant, the fulfillment of which was required to make the possession rightful. In this case, the plaintiffs may not have known until the day the notice to quit was served that the defendant had not paid the taxes for the year 1893, but they had provided that the failure to pay the taxes before they became delinquent, should work a forfeiture of the lease. By a fair interpretation of its terms, the defendant was required to pay the taxes to the proper officers, and the plaintiffs could have ascertained readily, from an inspection of public records, whether payment had been made as required by the lease. The

omission of the petition to show that the plaintiffs had known, thirty days before the commencement of this action, that the taxes were unpaid, was not, therefore, material. We conclude that the petition shows that this action was barred by section 3621 of the Code, and that the demurrer was properly sustained on that ground. The judgment of the district court is **AFFIRMED.**

THE FOWLER COMPANY, *et al.*, Appellants, v. ALICE
McDONNELL, *et al.*

Fraudulent Conveyance: CHATTEL MORTGAGE. A note for two hundred dollars, given by a husband to his wife, for money loaned by her before they were married, was renewed by a note for five hundred dollars, which was, in turn, replaced by one for one thousand dollars; each renewal note being for the principal and interest for the prior note, with credits claimed by the wife on sales of dairy products. The husband subsequently purchased merchandise from plaintiffs, and, while indebted to them, gave a chattel mortgage on the goods to his wife to secure the note for one thousand dollars, and another note given to her in payment of a loan which she procured by mortgaging a homestead which her father had given her. *Held*, that the mortgage was not fraudulent as to plaintiff, and this, though defendants fail to show, that each renewal was made for a liability which the wife could have enforced to the full amount of the new note.

Estoppel: HUSBAND AND WIFE. A wife who held notes against her husband at the time of property statements made by the latter, for the purpose of obtaining credit, which omitted all reference to the notes held by her, and held said notes at the time of his verbal statement that he did not owe his wife anything, is not estopped to deny the truth of such statements, where she did not know of, nor authorize them.

Appeal from Chickasaw District Court.—HON. A. N.
HOBSON, Judge.

WEDNESDAY, JANUARY 20, 1897.

ACTION in equity for the cancellation of a chattel mortgage alleged to be fraudulent, and to have established claims of the plaintiffs against the mortgaged

Burns & Sullivan, F. F. Swale, and Sullivan & Longley for appellants.

Springer & Clary and J. R. Bane for appellees.

ROBINSON, J.—On the twelfth day of February, 1895, the plaintiffs, the Fowler Company and Rider-Wallis Company, were creditors of the defendant Alexander McDonnell. He was then in the business of retailing merchandise at New Hampton, Iowa, and had been so engaged for one or two years. The debts due to the plaintiffs were contracted for merchandise he purchased of them. On the day specified, an agent of one of the plaintiffs called on McDonnell at his place of business, for a statement of the amount due his principal. After some conversation, McDonnell went out and executed to his wife and co-defendant, Alice McDonnell, a mortgage on all of his stock of merchandise and book accounts. The property mortgaged included about all he owns which is subject to execution, and he is insolvent. After the mortgage was given, the plaintiffs commenced actions against McDonnell to recover the amounts due them. The actions were aided by attachments, which were levied upon the mortgaged stock of merchandise, and a receiver was afterwards appointed, on the application of the plaintiffs, who took possession of the attached property, and has sold nearly all of it. The plaintiffs ask that the chattel mortgage be adjudged to be fraudulent and void as against them, that it be canceled, that their lien be established against the property, and that the receiver be required to pay to them the proceeds of the attached property.

The mortgage in controversy was given to secure

One was dated November 16, 1892, and was for the sum of one thousand dollars. The other was dated 1 February 15, 1894, and was for the sum of five hundred dollars. The defendants were married to each other in the year 1876. Prior to that time the defendant, Alice, loaned to her co-defendant sums of money at different times to the amount of about one hundred and fifty dollars. She had earned the money by teaching school, and in other ways. Three years after their marriage, McDonnell gave to his wife, for the money he had received of her, and interest, a note for two hundred dollars. In the year 1886, that note was taken up, and a new one, for five hundred dollars, was given, and in the year 1892, that note was replaced by the one thousand dollar note which the mortgage in controversy was in part given to secure. Each renewal note was given for the amount of the one it replaced, including interest, and for various credits which the wife claimed on account of dairy products and poultry sold, and perhaps for money obtained from other sources. The plaintiffs attack the various notes given on the ground that the claims made in regard to them are unreasonable, and that a full consideration for each note is not shown. The statements of the husband and wife in regard to the transactions out of which the notes grew, and the consideration for which they were given, were made as witnesses for the plaintiffs, and are not in any manner contradicted. It may be that the defendants do not show that each renewal note was given for a liability of the husband which the wife could have enforced to the full amount of the new note. In view of the length of time which has elapsed since some of the notes were given, it is not strange if they cannot do so. But, when the notes were given, the husband was not indebted to either of the plaintiffs, and, so far as is shown, no one could have been prejudiced by his

giving the notes, even if they were, in part, without a valuable consideration. It does not appear that they were given with any purpose to defraud persons who might thereafter become creditors of the husband, and a gift made in good faith to the wife at that time would have been valid as against subsequent creditors. The five hundred dollar note, secured by the chattel mortgage in question, was given in payment of a loan which the wife procured for the benefit of the husband, by giving a mortgage on the homestead which her father had given to her. Although some of the statements made by the defendants, in regard to the notes, are conflicting, we are of the opinion that the plaintiffs have failed to show that either of the notes in question is invalid, or that there is any ground for setting aside the mortgage in controversy.

It is claimed by the appellants that Alexander McDonnell made to them property statements for the purpose of obtaining credit which omitted all reference to the notes held by the wife, and that, on
2 at least one occasion, he said to an agent of one of the plaintiffs that he did not owe his wife anything. These claims are denied by McDonnell, but, if they were true, they would not prejudice the rights of the wife for the reason that she did not authorize nor know of the alleged statements, and is not in any manner estopped to deny their truth. We conclude that the plaintiffs have failed to show themselves entitled to any relief, and the judgment of the district court is **AFFIRMED**.

100 540
120 871

THE UNION MILL COMPANY, Appellant, v. G. H. PRENZLER, Administrator of the Estate of L. SEUFFERT, Deceased.

Attachment: ADVICE OF ATTORNEY. Plaintiff in attachment is not relieved of liability for exemplary damages in wrongfully suing out the same, merely because he made a fair statement of all the facts within his knowledge to his attorney, before the writ was sued out, but he must, in good faith, have believed that he had a good ground of attachment.

AMENDMENTS: Harmless error. In an action at law, aided by an attachment levied in July, 1894, a refusal to allow plaintiff to file an amendment claiming interest on his account from January, 1895, was harmless, where the jury found that plaintiff's claim was liquidated by the damage resulting to defendant from the attachment.

SPECIAL INTERROGATORIES. The refusal of special interrogatories is not ground for complaint, where the essential facts are embodied in another interrogatory which is submitted.

EXEMPLARY DAMAGES. It appeared that, while plaintiff, who had dealt with defendant for years, was seriously ill, the latter, fearing that he might die, and that they would have to wait a year for their claim if the property went into the hands of an administrator, endeavored, by intimidation and threats of legal process, to induce plaintiff's wife and daughter to turn over some of the property, and failing in this, they sued out a writ of attachment, for the alleged reason that plaintiff was about to convert the property into cash, for the purpose of placing it beyond the reach of creditors. *Held*, that five thousand dollars exemplary damages for wrongful attachment was not so excessive as to be disturbed, on appeal.

SURVIVAL OF ACTION: DAMAGES: Estates of decedents. The death of plaintiff, pending suit for wrongful attachment, and the substitution of his administrator, will not prevent the recovery of exemplary damages which might have been recovered by decedent himself.

ATTORNEY FEE. Where defendant, in an action aided by attachment, admits plaintiff's claim and recovers on a counter-claim against plaintiff and his sureties for wrongful attachment, the court may allow him attorneys' fees, as part of the costs.

Same. The court in an action upon an attachment bond for the wrongful suing out of the attachment, may allow attorneys' fees

9 for services rendered by attorneys for the attachment debtor in the entire defense to the attachment action, where such defense tended, merely, to show the wrongful issuance of the attachment.

Change of Venue. The court in its discretion, may properly deny an application for a change of place of trial on the ground of prejudice, where the affidavits tending to show prejudice are met by an equally large number of counter-affidavits tending to show the contrary, and, if there is any difference in the statements, it is in favor of those made for the party contesting the motion.

Appeal: EXEMPLARY DAMAGES. An award by the jury of exemplary damages, in an action for the wrongful suing out of an attachment, will not be disturbed, on appeal, as excessive, except in extreme cases.

REVIEW OF VERDICT. This court will not disturb a verdict supported by the evidence, merely, because it might not reach the same conclusion if it had to try the case anew, on the evidence.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTH, Judge.

WEDNESDAY, JANUARY 20, 1897.

THIS is an action at law, aided by attachment, originally commenced against L. Seuffert, to recover the sum of two thousand six hundred and fifty-five dollars, claimed to be due plaintiff for flour and feed sold and delivered. The defendant answered, admitting the claim, and pleading a counter-claim against the plaintiff and sureties upon the attachment bond for the wrongful suing out of the writ. After the filing of the answer, and before the case was called for trial, Seuffert died, and his administrator was substituted. The case was tried to a jury, resulting in a verdict and

Burns & Sullivan, W. W. Dodge, and Stutsman & Stutsman for appellant.

Seerley & Clark and Power, Huston & Power for appellee.

DEEMER, J.—I. Appellant first complains of the ruling of the court denying a motion for change of place of trial. The case was brought for the September, 1894, term of court, and was continued to 1 the November, and afterward to the January, 1895, term. At the January term a trial was begun, and during the progress of the trial defendant died. His administrator was substituted, and, upon this substitution being made, plaintiff moved for a continuance. This motion was sustained, by agreement of parties thereafter made, and the trial of the case was resumed, resulting in a verdict for defendant. A new trial was granted, and the case continued to the April, 1895, term. The motion to change the venue was filed April 13, 1895. The statutes of this state provide that such a motion cannot be made after a continuance, except for a cause not known to the affiant before such continuance. Code, section 2591. It would seem that the motion was filed too late, and for this reason was properly overruled. But, if this be not true, the statute provides that the trial court, in the exercise of a sound discretion, must decide whether a change shall be granted according to the very right and merits of the matter. Code, section 2590. It does not appear that

there is any difference in the statements, it is in favor of those made for the defendant, for the witnesses making them seem to have had the better opportunity to know of the situation.

II. Just before the commencement of the last trial plaintiff asked leave to file an amendment to its petition claiming interest on its account. The request was denied by the court, and error is assigned
2 on the ruling. The court below was vested with a large discretion in such matters, and, while the rule is to allow amendments, yet to refuse them is not reversible error, especially where, as in this case, no prejudice resulted. The amendment claimed interest on the account from January 25, 1895. The action was commenced and the attachment levied in July, 1894. The jury found that plaintiff's claim was liquidated by the damage resulting from the attachment; hence, plaintiff was not entitled to interest. The ruling, even if erroneous, was without prejudice. Again, the amendment was proposed on the very day the case was called for trial, and the practice of allowing amendments at such a time should not be encouraged.

III. Plaintiff asked the court to submit the following special interrogatories to the jury: "(1) Did the plaintiff, the Union Mill Company, by its president, A. McElhinney, make a fair statement of all the facts within his knowledge to J. F. Burns, an attorney at law, before the writ of attachment was sued out? (2) Do you find, on the case submitted as set forth in interrogatory 1 hereof, that said attorney advised that a good cause of action and a right to sue out
3 the writ of attachment existed?" The request was refused, but the court did submit the following: "(3) Was the writ of attachment directed to be sued out on the advice of J. F. Burns, an attorney at law, after a fair statement of all the facts at the

time in the possession of A. McElhinney, president of the company?" To this the jury answered: "No; all the facts were not given." It seems to us that this interrogatory embodies all the essential facts called for by the two refused, and that appellant had no cause of complaint. The jury clearly answered all material and relevant matters called for by the two interrogatories which were refused. An affirmative answer to interrogatory 1 would not have been a complete defense, as counsel argue. See *Acton v. Coffman*, 74 Iowa, 17 (36 N. W. Rep. 774); *Myers v. Wright*, 44 Iowa, 38.

IV. Complaint is made of the instructions given by the court, and of the refusal to give certain instructions asked by plaintiff. We need not set out the ones complained of. It is sufficient to say, that they state the law as it has been announced by this court in numerous decisions, and are singularly free from error or misstatement. The instruction, with reference to exemplary damages, closely follows the rule announced in *Nordhaus v. Peterson*, 54 Iowa, 71 (6 N. W. Rep. 77), and *Hurlbut v. Hardenbrook*, 85 Iowa, 606 (52 N. W. Rep. 510). The effect to be given advice of counsel was properly set forth, and instruction No. 13, asked by plaintiff, to the effect that the uncontradicted evidence showed that plaintiff had taken the advice of counsel, was properly refused, because there was a conflict on this point. The jury allowed defendant, as a part of the damages, interest on money which came into the hands of the sheriff, on garnishment proceedings. This is said to be error, because no claim for such damages is made in the counterclaim. We think the matter is sufficiently covered by the pleading, and need give the matter no further

one hundred and twenty dollars and fifty cents. This is based upon the thought that defendant asked judgment for ten thousand dollars in all, seven thousand, one hundred and twenty dollars and fifty cents of which was actual damages. This contention is fully met by the amendment to the counter-claim, which claims but two thousand dollars actual damages, and in all, both actual and exemplary, ten thousand dollars. Complaint is made of the instructions, as to the burden of proof. There is no merit in this. The instructions state the rule given by this court in numerous cases. We need not further refer to the numerous objections urged against the instructions. It is sufficient to say, that we find no error.

V. It is said, that the amount of damages allowed, both actual and exemplary, are excessive, and are the result of passion and prejudice. The amount found by the jury as actual damages, was seven hundred and seventy dollars and six cents; as exemplary, five thousand dollars.

As to the actual damages, it is sufficient to say that there was a decided conflict in the evidence as to each and every claim made by the defendant, and, under well known rules, we cannot interfere. Defendant claimed that, at the time of the attachment, a certain account held by him against R. Hodgens & Co. was good, and that the firm became insolvent after the attachment was rendered, and that he lost the same. To prove the solvency and insolvency of the firm, he introduced a witness, who said he knew their financial standing, who was permitted to give it as it was both before and after the attachment. It is said that this is error, for the reason that the witness based his testimony on, and had reference to the rating of the firm by commercial agencies. An examination of the record discloses that this is not true, and that the

court sustained objections to questions calling for the commercial ratings of Hodgens & Co.

As to the exemplary damages allowed, three objections are made: (1) It is said that the right to recover such damages ceases on the death of the complainant; (2) it is claimed that the evidence shows conclusively that the plaintiff acted on the advice of counsel; and (3) that they are grossly excessive, and indicate passion and prejudice on the part of the jury.

The first objection presents a question which is new to the courts of this state, and we have not been cited to, nor are we able to find many cases in which the question seems to have been
4 considered. Appellant insists that exemplary damages are not compensatory and, therefore, not property, and that, although under the statute, causes of action survive, yet the representative of a deceased person cannot recover them; and he cites, in support of his contention, *Sheik v. Hobson*, 64 Iowa, 146 (19 N. W. Rep. 875). That the general rule, both at common law and under the statute, is as claimed, must be conceded. 7 Am. & Eng. Enc. Law, 477; *Dwyer v. Railroad Co.*, 84 Iowa, 479 (51 N. W. Rep. 244); *Rose v. Railway Co.*, 39 Iowa, 246. But it must be borne in mind that, where the action is brought by a representative of one deceased, it is to repair the injury done to the estate, and the damages are assessed with reference thereto. Consequently, pain and suffering are not taken into account. Neither can exemplary or punitive damages be awarded, as a general rule, for they are peculiar to the person, and do not relate to pecuniary or property rights. And, notwithstanding all causes of action now survive, and may be brought despite the death of the person entitled to the same (Code, section 2525), yet, in assessing the damages, we must look to the

wrong to be remedied, and the injury to be repaired. When the action is brought by the representative of one deceased, it is to right the wrong done to his estate, and to take from the defendant that which will make the estate whole. But when the action, as in this case, is brought by the person injured, who dies during the pendency of the action, the law attempts to remedy the wrong done to him, and not necessarily to his estate; and the damages in such case are not only compensatory, but may include exemplary as well. The statute to which we have just referred has reference to the *cause of action*, and not to the rule of damages to be applied. This exception to the general rule—If, indeed, it can properly be said to be an exception—has been recognized by this court in several cases which we have heretofore had occasion to consider. In the case of *Muldowney v. Railway Co.*, 36 Iowa, 468, which was an action commenced by one Laughlin, who afterwards died, and his administratrix was substituted, we said: "His administratrix succeeded to the cause of action as it existed at the time of his death, and can it seems to us, recover just such damages as he would have been entitled to if he had survived. A different rule would obtain if the action had been commenced after his death for the benefit of the estate. *Donaldson v. Railway Co.*, 18 Iowa, 280. In this case the administratrix is substituted as plaintiff, and claims the damages which Laughlin, the deceased, sustained in consequence of the injury." This same distinction is also recognized in *Dwyer v. Railroad Co.*, *supra*. See, also, *Railroad Co. v. Barron*, 5 Wallace 90.

he would have been entitled to recover exemplary damages, if the jury saw fit to award them. The case of *Sheik v. Hobson*, relied upon by appellant, was decided upon different principles. It was there said that the punitory power of the law ceased when the defendant dies, and that the civil law never inflicts vicarious punishment. Such a rule has no possible application to this case, unless the rule is to be applied both ways. We do not think, however, that it should be so applied, for reasons which are so apparent as to need no further elaboration.

With reference to the second point made against the assessment of exemplary damages, that advice of counsel was a complete defense, we find that the jury made an answer to interrogatory No. 3, submitted to them, which destroys the force of appellant's argument; and, unless it appears that this finding is with-

out support in the evidence, there can be no
5 reversal of the case on this ground. We have gone over the evidence relating to this matter, and conclude that the finding of the jury to which we have referred has sufficient support in the evidence, and that we cannot interfere. Again, it is insisted,

in this connection, that there is no evidence
6 from which the jury could rightfully find that the attachment was maliciously sued out. We cannot agree with counsel in this conclusion. There was evidence from which the jury were justified in finding malice, and while we might not reach this conclusion, had we to try the case anew, yet we cannot interfere with the verdict on this ground.

The third objection to the allowance of exemplary

ought to interfere, except in extreme cases. The facts in this case are peculiar. The jury were
7 justified in finding that Seuffert was induced by plaintiff, who had every confidence in his honesty, integrity, and solvency, to purchase goods of the corporation. After dealing with him for many years, they hear that he is sick nigh unto death, and they go to Des Moines county to ascertain as to whether there was any change in his financial condition. They find him confined to his bed, unable to transact business, or to consult with any one with reference to it. By threats of legal process and intimidation, they try to induce his wife and daughter to turn over some of his property. Failing in this, they sue out a writ of attachment, alleging that defendant was about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors. The jury were justified in finding that there was no truth whatever in this allegation, but that the real reason for the attachment was that plaintiff was afraid Seuffert would die, and his property would go into the hands of an administrator, and they would have to wait a year for their money, which they did not wish to do. It is also in evidence that the attorney representing the plaintiff, said to Miss Seuffert that, if she did not have the property "signed over to plaintiff," they would take everything, close up the business, attach everything on the farm, and go right up from here and sell it; that they would go to trial and her father could not stand "to be lawed"; that plaintiff was a rich company; that McElhinney, the president, was worth a million, and they would take it from court to court, and tie up everything the father had got, and it wouldn't hurt the mill company a particle." There was also much other evidence, tending to show, a purpose to injure, annoy, harrass, and vex the defendant

to induce him to secure the plaintiff's claim. The exemplary damages were not out of proportion to the actual damages allowed by the jury; and, as said in case of *Saunders v. Mullen*, 66 Iowa, 728 (24 N. W.

8 Rep. 529): "A court, and especially an appellate tribunal, should not interfere in such cases, unless the conclusion is irresistible that the amount allowed is so great as to evince prejudice on the part of the jury." If the facts are, as claimed by appellant, a great wrong was done the deceased by the suing out of the writ of attachment in this case. There was not the least possible excuse for it, except a desire on the part of the plaintiff to secure their claim before Sueffert should die, and his estate pass into the hands of an administrator, to be administered upon by the somewhat slow process of law. The jury were justified in finding that plaintiff attempted, by dishonorable means, to induce the daughter of the deceased to, in some manner, secure their claim. There is little, if any proof, that the facts stated as grounds for the attachment, were true, or that the plaintiff had any reason to believe them to be true. They knew that Sueffert was on a sick bed, unable to transact any kind of business, and were led to believe that he would never recover. In view of all this, they sought the strong arm of the law, and the extraordinary process of the courts, for the sole purpose of securing their claim before the property of their debtor should pass into the hands of an administrator. We cannot, in view of these circumstances, interfere with the allowance made by the jury for exemplary damages.

VI. It is argued that the court erroneously permitted the defendant to give in evidence the plaintiff's wealth. The argument is based upon a false premise. No such evidence was introduced. True it is that defendant was permitted to give in evidence a statement

made by plaintiff's attorney to Miss Seuffert as to the plaintiff's wealth, made at a time when he was trying to induce her, as the representative of her father, to secure the claim. This evidence was clearly admissible. But, if it were not, plaintiff cannot complain, for it was not properly objected to at the time of the trial.

VII. Several errors are assigned on the admission and rejection of testimony. The points made are not of sufficient importance to be specifically referred to in this opinion. It is sufficient to say that we have examined all which counsel have seen fit to argue, and find no error. Many of the matters objected to are explanatory, and all or nearly all related to collateral matters of so little moment in the case as not to require serious consideration.

VIII. Another assignment of error is that the verdict is contrary to law, and is not sustained by the evidence. In view of what has been said in the former part of this opinion, it is apparent that the case is one which was properly submitted to the jury for them to determine. This was done under proper instructions from the court, and the result we cannot disturb.

IX. After the verdict was returned, defendant filed a motion asking the court to tax attorney's fees for defendant as part of the costs. This motion was supported by evidence adduced upon the hearing, and the court allowed the sum of one thousand two hundred dollars as attorney's fees for defendant's attorneys. It is claimed that this was error. The amount to be allowed for such services was a question for the court to determine, and, in the light of the evidence adduced, we cannot say that his conclusion was erroneous. Plaintiff's claim was admitted, and the whole defense tended to show the wrongful issuance of the attachment. The case falls

squarely within the rule announced in the cases of *Whitney v. Brownell*, 71 Iowa, 254 (32 N. W. Rep. 285); *Lyman v. Lauderbaugh*, 75 Iowa, 481 (39 N. W. Rep. 812); *Mercantile Co. v. Chandler*, 90 Iowa, 650 (57 N. W. Rep. 595); *Porter v. Knight*, 63 Iowa, 365 (19 N. W. Rep. 282). The exceptions to the evidence adduced in support of the motion are not well taken, for the reasons just suggested. On account of the size of the verdict we have examined this case with more than usual care, and are constrained to say that the record is exceptionally free from error. The trial court seems to have exercised unusual care in submitting the case to the jury, and the verdict, while large, and no doubt something of a hardship upon appellant, has such support in the evidence that we cannot, in view of the settled rules of law, disturb it. The judgment is therefore **AFFIRMED**.

C. M. KELLOGG AND E. F. KELLOGG, Appellant, v. F.
H. WINDOW.

Validity of Judgment: JOINT DEFENDANTS: *Husband and wife*. A judgment for plaintiff, in a suit against husband and wife, on their joint note, is valid as to the wife, who, after appearing and filing an answer, withdrew the same, and made no further defense, though invalid as to the husband, who was not served.

Appeal from Floyd District Court.—HON. P. W. BURR,
Judge.

WEDNESDAY, JANUARY 20, 1897.

IN March, 1885, the defendant in this suit obtained a judgment against the plaintiffs herein, on their

notice of the pendency of the other suit; that he neither appeared, nor authorized an appearance for him; and that he did not know of the judgment until several years after its rendition. It also appears, from the petition in this case, that the plaintiffs herein, had a meritorious defense to the notes in the other suit, in that they were obtained by fraud, and were without consideration. By a supplemental petition, it was made to appear that, since the commencement of this suit, property of the plaintiff had been seized by virtue of an execution issued on said judgment. By an amendment to the petition, the judgment in the other suit is set out, and made a part of the petition. Defendant then moved to dissolve the temporary injunction as to E. F. Kellogg, and the court sustained the motion. Plaintiffs then further amended their petition by setting out a contract between C. M. Kellogg and the defendant, which contract was the consideration for the notes on which the judgment was obtained. This contract provided for certain medical services to be rendered by defendant for the plaintiffs, and the amendment shows a breach of the contract in such terms as would have constituted a defense to the notes in the other suit. The judgment entry in the other suit, made a part of the petition in this suit, recites an appearance therein by both defendants, by attorney, the filing of an answer, and afterward a waiving of a jury, the withdrawal of the answer, and a judgment for the amount stated. Defendant moved to dismiss the action as to E. F. Kellogg, for the reason, among others, that it appears that the judgment sought to be set aside is a valid one. The court sustained the motion, and from the order dismissing the petition, the plaintiff, E. F. Kellogg, appealed.—*Affirmed.*

Robert Eggert for appellant.

Ellis & Ellis for appellee.

GRANGER, J.—It will be seen that the only question we have to consider is, was there a valid judgment in the other suit against E. F. Kellogg? E. F. Kellogg is the wife of her co-plaintiff, and it will be remembered that she appeared in the other suit, filed an answer, and then withdrew it, and permitted judgment to be entered against her. For the purpose of the case, the judgment as to her husband will be treated as void. It is urged as an outrage on justice, that E. F. Kellogg should be required to pay a judgment, when her co-defendant, who has a complete defense, was not served with notice. The claim might be true, if she herself were not in fault for the position she is in. She was a joint maker of the notes on which judgment was entered. She was in court, with the privilege of making the defense that her co-defendant could have made. By her action in withdrawing her answer, she confessed her liability on the notes. It is her fault, rather than that of the law, that she is now a judgment debtor. In a sense, she is a judgment debtor on her own confession. Appellant cites a common law rule that actions must be brought against all joint obligors on a contract, or note. It is admitted that Code section 2550, so changes the common law rule as to permit an action against any one of joint obligor; but it is said that it does not permit a judgment to be entered against a joint obligors who has not been served, and as to whom the court has not jurisdiction. That is true, but it has no other effect than that the judgment is void as to such party. The entry of a void judgment as to C. M. Kellogg did not change the

situation as to E. F. Kellogg. No objection is made as to the manner of presenting the question, and the judgment must stand **AFFIRMED**.

HURD & WILKINSON V. HOWARD NEILSON AND LOUISA J. NEILSON, Appellants.

100	555
104	142
100	555
e139	309

Land Sale Commissions: CONTRACTS. A real estate broker is not entitled to commission under an agreement to allow him all he can obtain for property over a specified amount, where he neither completed a sale or negotiations for a sale in compliance with the authority conferred by the principal, although the latter made a sale of the property to one with whom the broker had negotiated.

Directing Verdict. A motion to direct a verdict should be sustained if, considering all the evidence, it clearly appears that it would be the duty of the trial judge to set aside a verdict if found in favor of the party upon whom the burden of proof rests, and against whom the motion is directed.

Appeal from Hamilton District Court.—HON. B. P. BIRDSALL, Judge.

WEDNESDAY, JANUARY 20, 1897.

THIS is an action to recover a commission for the sale of real estate. There was a verdict and judgment for the plaintiffs, and defendants appeal.—*Reversed.*

Wesley Martin for appellants.

Hyatt & Hyatt for appellees.

KINNE, C. J.—Defendant, who was the owner of three hundred and fifty-six acres in Hamilton county, Iowa, placed the same for sale with the plaintiffs, who were land agents residing in said county. The terms of sale authorized by the defendants were embraced in a letter of date of August 18, 1894, written by him to Hurd, one of the plaintiffs. It was as

follows: "Dear Sir: Yours of August 13th received and noted. In regard to the amount of land that I have near Blairsburg, is 356 acres. Part of it is on section 25, and the balance on the 36th section. Land commences about 80 rods east of the station. The railroad fence is my south line. So far as that, it is pretty well located. Will sell the land at \$30 per acre. Want from three to five thousand down, and a mortgage on the place for the balance; interest at 6 per cent. per annum. Will take it all down if a party wants to pay it all. Will give you all you can get over \$10,000 net, as your commission for selling. That is, I want the place to net me \$10,000 clear of all expenses. If you want to try and sell the place that way, go ahead. The farm is cheap as dirt. Would not sell it at all, but I am so far away that I do not have time to tend to it. Let me hear from you in the matter, and what you think about it. Very truly, Howard Neilson." Plaintiffs claim that they negotiated a sale of the land to one Mitchell for ten thousand three hundred and twenty-four dollars, and that Mitchell was to return the next day and conclude the deal, and that the defendants, knowing of said negotiations, and for the purpose of defeating their right to a commission, and in fraud of their rights, did on the following day sell the same land to Mitchell. At the conclusion of plaintiffs' evidence, defendants moved the court to take the case from the jury, and to enter a judgment in their favor, because it had

in the charge, and in rulings upon the admission of evidence.

The motion should have been sustained. The evidence failed to show that plaintiffs had made or negotiated a sale of the land in accordance with the authority given in the letter. Nor was there

2 evidence to sustain the claim that the defendants had made the sale of the land to Mitchell

with knowledge of the negotiations had between plaintiffs and Mitchell. The sale arranged for with Mitchell, as claimed by the plaintiffs, was for two hundred dollars cash, three thousand dollars on January 1, and the balance in cash, March 1, 1895. The authority was to sell for not less than three thousand dollars, cash, at time of sale, and the deferred payment was to be secured by a mortgage on the land, and to draw six per cent. interest. In the claimed negotiations with Mitchell by plaintiffs, no provision for securing the deferred payments was made, and there was no arrangement for the payment of interest. Mitchell never paid plaintiffs anything, and testifies he never agreed to take the land. If it be conceded, however, that, as plaintiffs claim, he did agree to take the land, it was upon terms and conditions other than those embraced in the letter of defendant, and therefore such a sale by the agent would not be binding upon the defendants. Having failed to show either a completed sale or negotiations for a sale, in compliance with the authority conferred upon them, plaintiffs were not

entitled to recover, and the motion should have

3 been sustained. When a motion is made to direct a verdict, it should be sustained if, con-

sidering all of the evidence, it clearly appears that it would be the duty of the trial judge to set aside a verdict if found in favor of the party upon whom the burden of proof rests. *Meyer v. Houck*, 85 Iowa, 319 (52 N. W. Rep. 235); *Beckman v. Coal Company*, 90 Iowa

255 (57 N. W. Rep. 889). It seems to us there was a clear failure to establish such a state of facts as would authorize a recovery by plaintiffs.

In this view of the case we need not consider at length the other errors assigned. In so far as the instructions given were not in harmony with our holding, they were incorrect. The instructions asked by the defendants should have been given, if the case was submitted to the jury; but, as we have indicated, there was nothing to submit to the jury. For the errors pointed out, the judgment is REVERSED.

K. KOSTER, *et al.*, v. CHARLES SENEY, Appellant.

Appeal: DENIAL IN ABSTRACT: Stipulation. A stipulation for a submission of a case on appeal on the two abstracts filed, waiving a transcript, does not authorize the court to review questions of
 1 fact, when the additional abstract filed by appellee states that all the evidence is not contained in the abstract, which statement is not denied.

Foreclosure of Chattel Mortgage: CONSTRUCTION OF MORTGAGE. A chattel mortgage provided that it should be void upon payment of the notes secured, according to their tenor. It also gave the mortgagee authority to take possession at any time, whether the
 2 debt was due or not, and "to sell at public auction sufficient of the same to pay the debt." *Held*, while the mortgagee might take possession at any time, he could not *sell* until the mortgage debt or some part of it became due.

ROBINSON, J., dissenting.

Appeal from Franklin District Court.—HON. B. P. BIRDSALL, Judge.

WEDNESDAY, JANUARY 20, 1897.

ACTION at law to recover damages for alleged breaches of warranty in the sale of personal property, and to recover actual and exemplary damages for the wrongful conversion of personal property. There was

a trial by jury, and a verdict and judgment for the plaintiffs. The defendant appeals.—*Affirmed.*

J. W. Luke and D. W. Dow for appellant.

E. P. Andrews and W. D. Evans for appellees.

DEEMER, J.—The petition contains three counts, and sets out three causes of action, substantially as follows: The first count alleges that on or about the first day of January, 1894, the plaintiffs, K. Koster and P. Koster, were, and for a long time had been, the owners of four horses, particularly described, one set of work harness, and about two hundred and fifty bushels of corn; that on or about the date specified, the defendant did wilfully, wrongfully, and maliciously, for the purpose of depriving the plaintiffs of the ownership of said property, and with intent to injure, oppress, and defraud them, take possession of said property, and wilfully, wrongfully, and maliciously convert it to his own use. The second count states that in March, 1893, the plaintiffs purchased two horses of the defendant, who warranted them to be nine years old; that the warranty was relied upon by the plaintiffs in making the purchase, and known to be false by the defendant. The third count states that in March, 1893, the plaintiffs purchased a horse of the defendant, who warranted him to be sound, and that the plaintiffs relied upon that warranty; that before delivery of the horse was made, the plaintiffs discovered that the horse was sick, and refused to accept him; that thereupon the defendant represented and warranted that the ailment was temporary, and that the horse would recover, but that, if he did not, the defendant would refund the price paid for him; that the horse was then accepted, but was in fact sick of a fatal disease, and died soon after he was

received by the plaintiffs. Judgment is demanded for actual damages to the amount of eight hundred and ten dollars, and for exemplary damages in the sum of two thousand one hundred dollars. The answer contains a general denial, and alleges as an affirmative defense that in March, 1893, the plaintiffs executed and delivered to the defendant a chattel mortgage on the property described in the first count of the petition to secure the payment of two promissory notes, one of which was for the sum of seven hundred and twenty-two dollars and seventy-five cents, payable on or before October 1, 1893, and the other was for the sum of two hundred and fifty dollars, payable on or before October 4, 1894, with interest at the rate of eight per cent. per annum; that on the eighteenth day of December, 1893, the sum of twenty-seven dollars and ninety-one cents remained due on the first note, and nothing had been paid on the other; that the defendant had been credibly informed that the plaintiffs had sold some of the mortgaged property without his knowledge or consent, with intent to defraud him, and that on the day last specified he placed the mortgage in the hands of the sheriff, as his agent, to take possession of enough of the mortgaged property to pay the amount due on the first note, and costs and expenses; that thereupon the sheriff took possession of about two hundred bushels of corn, the value of about forty dollars, and afterwards, at the request of the plaintiffs, took possession of the four horses and one set of harness described in the first count of the

horses to the plaintiffs, including those described in the petition; but alleges that the contract of sale was in writing, and did not contain the warranties claimed by the plaintiffs, and that one hundred and twenty-five dollars of the contract price are unpaid. The plaintiffs filed a reply which admitted the execution of the larger of the two notes, but averred that the amount thereof was never due. Several items which went to make the consideration of the note were set out and alleged to be erroneous, and among them was one of eleven dollars, which it is alleged was for twelve numbers in a certain lottery or raffle in which the defendant sold numbers to several persons, and by which he proposed to raffle off a certain piano, which was to be the property of the holder of the winning number, to be determined by chance: that the raffle has never taken place; that the defendant retains the piano, and that the plaintiffs have never received any consideration for the item. The jury returned a verdict in favor of the plaintiffs for the sum of eight hundred and seventeen dollars and four cents, and found specially that three hundred and seventeen dollars and four cents were due on the first count of the petition, and that the plaintiffs were entitled to five hundred dollars as exemplary damages.

I. Interrogatories were submitted to the jury asking if they found any damages on the causes of action set out in the second and third counts of the petition, but were not answered, and from this fact, and the special findings returned, it is clear that the jury found in favor of the defendant on the second and third counts, and that the only questions involved in this appeal are those which grow out of the

1 first count. The second count was filed as an addi-

do not contain all the evidence introduced and heard. That it is not denied, and must be taken as true. *Goode v. Stearns*, 82 Iowa, 710 (47 N. W. Rep. 893); *Hopkins v. Railway Co.*, 94 Iowa, 752 (64 N. W. Rep. 603). Moreover, the abstract of the appellant shows affirmatively that the bill of exception was not filed within the time fixed by order of the court and the agreement of parties, and it does not appear that any evidence was made of record. A stipulation of the parties which provides for the submission of the cause on the two abstracts, and waives a transcript of the record, has been filed. But that does not answer the purpose of a denial of the additional abstract, nor show that the two abstracts contain all the evidence upon which the case was heard. In view of the condition in which the record appears, we cannot determine any question which requires an examination of the evidence, and as the appellees have not filed an argument, we will follow our practice in such cases, and consider only those questions which seem to be of controlling importance.

II. The court, in referring to the mortgage and two notes which it was designed to secure, charged the jury as follows: "You are instructed, that under the mortgage defendant had the right to take
2 possession of all the property therein described, at any time he chose to do so, and no damage could be assessed against him for such taking. He did not, however, have any right to sell said property before the debt secured thereby became due. In other words, while he would have a right under said mort-

secured thereby became due, or any part thereof, then he is liable to account to the plaintiffs for the fair and reasonable value of the property so sold, without reference to the amount for which the sale was made." The appellant insists that, so far as this portion of the charge denied the right of the mortgagee to sell the mortgaged property for the portion of the debt not due, it was erroneous. The condition of the mortgage is that, if the mortgagors shall pay to the mortgagee the two notes described, "according to the tenor thereof, then these presents to be void; otherwise in full force." The mortgage also contains the following provision: "And I, the said K. Koster & Sons, do agree with the said Charles Seney, that these presents shall be his sufficient authority to take immediate possession of said goods and chattels at any time he may choose, and to sell at public auction sufficient of the same to pay the debt, with all reasonable costs and attorney's fees; the balance of the proceeds to be accounted for to the mortgagor on demand." This gave to the mortgagee the right to take actual possession of the mortgaged property at any time he elected to do so, whether the debt it was designed to secure was due or not; but did it give him the right to sell before maturity of the notes which it was given to secure? It seems to us that to so hold would not only render nugatory some of the express language of the instrument, but also give to it a meaning the parties never intended. The condition of the mortgage was: "That if said Koster & Sons shall pay to said Chas. Seney, his heirs and assigns," etc., "his two promissory notes dated March 1st, and described as follows, to-wit: One for \$722 and 75-100, payable October 1, 1893, and one for \$250, payable October 1, 1894, with interest at the rate of 8 percent. per annum, according to the tenor thereof, then these presents to be void; otherwise in full force." By the express

terms of the instrument the debt was not to become due until the maturity of the notes. According to appellant's contention, the condition permitting sale by the mortgagee authorized him to sell at any time, and to cancel the indebtedness, whether matured or not. We do not think this is a correct construction of the instrument. Authority to sell to pay a debt does not ordinarily contemplate a sale before the debt is due, and it should not be held to do so when conferred upon a mortgagee, as in this case, except that such construction be the only reasonable and consistent one to be deduced. If appellant's contention should be adopted, it would not only deprive the mortgagor of his equity of redemption, but it would also change the maturity of his notes, and make them payable upon demand. This identical question was determined by this court adversely to appellant in the case of *Bank v. Taylor*, 67 Iowa, 572 (25 N. W. Rep. 810), and this extract from the opinion in that case is peculiarly applicable here: "In determining the effect of the instruments, both conditions must be considered, and when they are considered together we think that, while they empower the holder to take possession of the mortgaged property before the maturity of the debt, if he deemed himself insecure, they did not empower him to sell it until after its maturity, for the mortgagor's equity of redemption did not expire until the maturity of the debt. The debt evidenced by the instruments was not subject to be diminished before its maturity, and there is no uncertainty as to the amount to be recovered thereon at maturity." Nothing need be added to this language of Reed, J., as it seems to be conclusive. It is said, however, that this case has been overruled by the later case of *Robinson v. Gray*, 90 Iowa, 699 (57 N. W. Rep. 614). But not so, we think. The case is not expressly overruled by this later one. On the contrary,

it is carefully and clearly distinguished, and it is manifest, we think, that there was no intention to overrule it. The condition in the *Robinson-Gray Case* was as follows: " * * * Whenever the said mortgagee shall choose so to do, then, and in that case, it shall be lawful for the said mortgagee * * * to take immediate possession of said goods and chattels, * * * and to sell the same, * * * or so much thereof as shall be sufficient to pay the amount due, or to become due, as the case may be, with all interest, taxes," etc. Here was not only authority to sell to pay the debt according to its terms, but to sell to pay the debt, whether due or not. As said by Rothrock, J., in the *Robinson Case*, "It will be seen from an examination of that part of the mortgage in the case at bar, that the provisions thereof are not the same as those in the cited case." *Bank v. Taylor*. After remarking that the provisions in regard to taking possession are the same in the two cases, Judge Rothrock continues: "But in the case at bar there is the further provision that, after seizing the property, the mortgagee may 'sell the same at public or private sale, or so much thereof as may be sufficient to pay the amount due, or to become due, as the case may be.' How could it be possible to make a sale of the property, and pay the amount to become due, unless the sale was made before the account becomes due? The authority given to sell, as plainly provides that a sale may be had before the amount becomes due as if it had been so stated in exact language. There is no room for construction, as in the case of *Bank v. Taylor*." Nothing further need be said to show that the case of *Bank v. Taylor* was not overruled in the *Robinson-Gray Case*. From the dissenting opinion of Given, J., it also appears that the *Taylor Case* was fully considered, and that there was no intention on the part of the majority of the court to overrule it.

For the reasons stated, the instruction complained of was not erroneous.

III. It is claimed that other paragraphs of the charge were erroneous, as applied to the facts in the case. As the evidence is not before us, we cannot determine whether the claim thus made is well founded. Other questions discussed cannot be considered for the same reason. There is no prejudicial error in the record, and the judgment is **AFFIRMED**.

ROBINSON, J. (dissenting).—I cannot agree to the interpretation of the mortgage in controversy, adopted in the opinion of the majority. It is not claimed that the mortgage was obtained by fraud, nor that it does not correctly represent the contract of the parties. Therefore its terms should be controlling. The opinion of the majority holds, correctly, as I think, that the stipulation in regard to the foreclosure of the mortgage “gave to the mortgagee the right to take actual possession of the mortgaged property at any time he elected to do so, whether the debt it was designed to secure was due or not,” but holds that it did not give him the right to sell the property before the maturity of the notes. The mortgage was given on the seventeenth day of March, 1893. The first note it secured was due October 1, 1893, and the second one a year later. Therefore, according to the rule of the opinion of the majority, the mortgagee might have taken possession of the mortgaged property in March, 1893, and held it at the cost of the mortgagors more than a year and a half before selling it. The mortgaged property consisted of five

and twenty-five dollars. A condition which would permit the mortgagee to deprive the mortgagor of the use of such property for a year and a half, and charge him the reasonable cost of keeping it during all that time, is, on the face of it, so unreasonable, as to challenge investigation. It was well said in *Robinson v. Gray*, 90 Iowa, 705 (57 N. W. Rep. 616), that: "The consequences of holding that there may be possession, but no sale, are apparent. If the mortgage in such case be upon live stock, and the debt has a long time to run before maturity, such a procedure would be ruinous to the security, and a loss to both parties." So, in this case, to construe the mortgage to permit the mortgagee to take and hold the mortgaged property for a year and a half before selling it, would be to give him a power to harass the mortgagor and destroy the value of the mortgaged property by consuming it in the payment of costs, which he should not have unless clearly required by the terms of the contract. Such a contract could be made a mere instrument of oppression. The mortgage construed in *Robinson v. Gray* and in *Wells v. Chapman*, 59 Iowa, 660 (13 N. W. Rep. 841), authorized a sale of the property "to pay the amount due or to become due, as the case may be," while the mortgage involved in this case authorized a sale "to pay the debt." In my opinion, these provisions are, in legal effect, precisely the same. The word "amount," used in the first two, standing alone, is not the equivalent of the word "debt;" but the phrase "the amount due," or "to become due," as used, is the exact equivalent of the word "debt," as used in the mortgage in controversy. The debt of that mortgage is represented by the two notes which it was given to secure, and had an existence from the time they were given. An obligation to pay a sum of money is none the less a debt because it is not due. *Scott v. City of Davenport*, 34 Iowa, 213. The true

interpretation of the contract in question appears to me to be as follows: Payment of the notes, according to their tenor, would have made the mortgage void, but the mortgagee was not obliged to wait for either note to mature. He could, at his option, take possession of and sell the property at any time, and make the notes payable at any time to the extent of the amount realized from the sale, if it did not exceed the sums due on them. While such a contract as that may be improvident, yet it appears to be much less objectionable than the one which the opinion of the majority holds was made. The interpretation for which I contend appears to me to be fully sustained by the cases of *Robinson v. Gray*, and *Wells v. Chapman, supra*. See, also, *Richardson v. Coffman*, 87 Iowa, 124 (54 N. W. Rep. 356); *Cole v. Shaw* (Mich.) 61 N. W. Rep. 869. It is true that the case of *Bank v. Taylor*, 67 Iowa, 572 (25 N. W. Rep. 810), may be regarded as authority for a different conclusion, but it appears to me to be in conflict with *Wells v. Chapman, supra*, and to have been overruled in effect by *Robinson v. Gray, supra*, and to be in violation of well established rules of interpretation. True, the last-named case does not overrule the *Taylor Case* in terms, and it refers to some verbal differences between the instruments construed in the two cases, but the rule of the *Taylor Case* was not approved, and it was referred to in terms which may well be regarded as implying doubt as to its correctness. The interpretation for which I contend, appears to me to be required by the language of the mortgage in question, and to be much more reasonable and beneficent than the other. Its practical operation, in most cases, would secure a larger amount from the sale of the mortgaged property, to apply on the mortgage debt than would be obtained under the rule of the majority. An honest mortgagee may find it necessary to

take possession of the property pledged as security to preserve it from waste, or wrongful conversion, by the mortgagor, yet under the rule of the majority opinion he may be compelled to keep it until the cost of maintenance has consumed a large share, if not all, of its value, and to that extent all parties in interest be deprived of benefit from it. My opinion is that the district court erred in its charge to the jury, and that the judgment should be REVERSED.

THE AULTMAN & TAYLOR COMPANY V. LEONARD LAWSON,
et al., Appellants.

Contracts: DIVISIBILITY: Construction. A contract for the sale of a separator and engine is divisible, and the purchaser cannot

- 1 rescind the contract in its entirety for breach of warranty as to the engine alone, where the warranty as to the engine and the separator are separate, and the contract provides that the war-
- 2 ranty as to one shall not apply to the other, nor in any way affect the payment of the purchase price of the other, and the consider-
- 3 ation, though stated in one lump sum, is the aggregate of prices
- 4 agreed upon as to the different parts, notwithstanding that the property was described as an establishment.

SAME. It cannot be urged against the divisibility of a contract for the purchase of a threshing outfit, consisting of several parts, that

- 4 the consideration is stated as a gross sum, where it appears that this is the aggregate of the prices agreed upon as to the different parts.

Appeal from Shelby District Court.—HON. WALTER I. SMITH, Judge.

WEDNESDAY, JANUARY 20, 1897.

100	589
124	742
100	589
133	604
100	589
135	310
135	312

Aultman & Taylor Eureka engine complete; also, one tank wagon complete." Defendants answered that the notes sued upon were given for the purchase price of the property described in the mortgage, and pleading breach of warranty, rescission, and failure of consideration. Judgment was rendered for the full amount of the notes in favor of the plaintiff, and decree entered foreclosing said chattel mortgage. Defendants appeal. —*Affirmed.*

Byers & Lockwood for appellants.

Thos. H. Smith for appellee.

GIVEN, J.—I. The learned district judge found as follows: "(1) That defendants executed to plaintiff the notes and mortgages alleged in the petition. (2) That said notes and mortgages were given in consideration of what is known as one of plaintiff's No. 32 establishments, sold by plaintiff to Leonard Lawson, under a written contract, a copy of which is attached to defendants' second amendment to answer. (3) That defendants have failed to establish that said contract was obtained by such false representation on the part of plaintiff, as to entitle defendants to avoid or rescind the same. (4) That, by the express terms of said written contract, said machinery was sold, 'subject solely and only to the warranty printed below'; and that thereby all other warranties, whether express or implied, are excluded. (5) That the establishment sold to said defendant Leonard Lawson consisted of a traction engine, a separator, a water tank, a weigher and elevator, and other things incident to a complete steam threshing outfit. (6) That said separator complied with all the terms of the written contract. (7) That it was provided by said written contract that, 'when engine and thresher

is sold as an establishment, the failure of any part of machine to fulfill its warranty shall not in any way, affect the payment of the purchase price of any other part or parts of said establishment,' and that thereby defendants are precluded from rescinding as to the separator. (8) That, this being a suit on notes negotiable in form, they import a full consideration; and, to defeat a recovery to the full extent of said notes, defendants must prove the extent to which the consideration has failed, and that they have wholly failed to do so."

The court held "that when a suit is brought on a negotiable promissory note, and the defendant relies on a partial failure of consideration, or a set-off, he cannot defeat a recovery of the whole amount of the note, without showing the amount of such failure to set off." Appellants' sole complaint is of this holding by the court. They concede that, if the written contract of purchase is divisible, the conclusion is correct, but contend that it is not divisible, and therefore the court erred. The sole question to be considered is, whether the written contract is divisible. Other questions are discussed by appellee, but, in view of this single contention of appellants, they need not be considered; for, if appellants' contention is correct, the judgment must be reversed, and if not, it must be affirmed. The contract of purchase is in the form of an order from the defendant Lawson to the plaintiff, for "one of your No. 32 establishments, consisting of Eureka 12 horse power engine complete; 32 in. cylinder; separator, 48 in. rear; also, 150 ft. Gandy belt; also, one weigher and elevator, combined; one tank wagon,—all complete." By the next paragraph, Lawson agrees to pay the freight charges, "and further agrees to pay to your order, before the time of delivery, the sum of nineteen hundred and eighty dollars, as follows." Then follows the provision for the

five promissory notes, the last falling due January 1, 1894, being the notes sued upon, and to secure which the mortgage was given. The contract is quite lengthy, and we will only notice so much thereof as is necessary to a determination of the question under consideration. It provides that the sale is "subject fully and solely and only to the warranty printed below," Therefore, evidence as to other warranties cannot be considered. Printed below is a paragraph entitled, "Warrant on Thresher," wherein it is warranted "that with good management, the 'Aultman-Taylor' thresher, is capable of doing a good business in threshing and cleaning grain, and is superior in its adaptation for separating and saving from the straw the various kinds and conditions of grain and seeds." This warranty is further conditioned that the purchaser shall follow the printed rules of the manufacturers, and if, by so doing, he is unable to make it operate well, will give written notice by registered letter. "If they are not able to make it operate well (the purchaser rendering necessary and friendly assistance), and the fault is in the machine, it is to be taken back, and the payments refunded, or the defective part remedied and made the same as in their other machines, which do perform satisfactorily." The next paragraph is entitled "Warranty on Engine," and warrants "that with good management the 'Aultman-Taylor' engine is capable of supplying as much power as any engine of the same horse power made in the United States, and that it is constructed of first-class material throughout." This warrant is further conditioned the same as that on the thresher. The next paragraph is entitled "Warranty on Sawmill," but, as no sawmill was purchased, it need not be further noticed. Said contract contains these further provisions: "The warranty on engine applying to engine only, the warranty on thresher to thresher and horse power only,

when engine and thresher, or engine and sawmill, or any other combination of machinery is sold as an establishment, the failure of any part, or machine, to fulfill its warranty shall not in any way affect the payment of the purchase price of any other part, or parts, of said establishment."

II. "A party is not entitled to rescind a divisible contract for a breach of its conditions, unless such breach goes to the whole consideration." *Hanson v.*

Heating Co., 73 Iowa, 77 (34 N. W. Rep. 495);

2 *Myer v. Wheeler*, 65 Iowa, 390 (21 N. W. Rep. 692), and cases there cited. In *Parsons*, Cont.

(8th Ed.), page 634, on the subject of the entirety of contracts, it is said: "No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties; and this must be discovered in each case, by considering the language employed and the subject-matter of the con-

3 tract." Appellants rest their contention, that the contract is an entirety, on the claim that the machinery was sold "as an establishment," and that the consideration is in "one lump sum." If nothing further appeared, the language of the contract in these respects would clearly indicate that it was intended as a single contract. It will be observed, however, that the contract as to the thresher, and as to the engine, are separately expressed, and that the failure of either "to fulfill its warranty, shall not in any way affect the payment of the purchase price of any other part or parts of said establishment." While it required both engine and thresher to make a complete establishment, either could be used with
4 another engine or thresher; and hence the provision that a failure of one should not affect payment for the other. True, the consideration is stated in "one lump sum," but the evidence shows that

sum was the aggregate of prices agreed upon as to the different parts. The contract does not show the prices on different parts, but, being silent on that subject, it was competent to prove what the agreement was in that respect, such proof not being in contradiction of the contract. Defendant received, with the establishment, an elevator and weigher, price ninety dollars, which was taken back at his request, and the price credited on the notes, fifteen dollars being credited on each.

Appellants cite *Fletcher v. Arnett* (S. D.) 57 N. W. Rep. 915. The ruling is well summarized in the headnote, as follows: "A contract on the part of father and son to convey land owned by the father individually, and land owned by the son individually, to a party who agrees to convey a tract of land on which there was a mortgage, but who agrees to pay off and discharge said mortgage, and pay one thousand and forty dollars cash, constitutes an entire contract, although there may be a clause in the contract that in case the mortgage is not paid off, and the one thousand and forty dollars cash not paid, the deed to the land conveyed by the father shall be returned, and the party's right to such land be forfeited." An examination of that contract shows that it does not contain any similar provisions to those found in this contract, and that the decision is not in point in this case. *Baird v. Boehner*, 77 Iowa, 622 (42 N. W. Rep. 454), also cited, was a civil action for seduction. Defendant set up a contract of settlement, whereby, in consideration of a sum to be paid, plaintiff agreed to leave and to stay away from Malvern for one year, and to "waive all claims, both criminal and civil," against the defendant. The court held the agreement to waive all claims "criminal" to be illegal, and that the contract was not severable. The court says: "If plaintiff should

attempt to enforce the contract after she had violated it by prosecuting defendant, she could not insist that the contract is divisible, and that she should recover to the extent to which her other promises constituted a part of the consideration. It will not be claimed that she could recover. It could not be determined just what sum defendant ought to recover against plaintiff's claim to recover for his breach of the contract." We have stated enough of the case to show that it is not authority for holding that this contract is not severable. *Wernli v. Collins*, 87 Iowa, 548 (54 N. W. Rep. 365), is cited and especially relied upon. That action was upon a contract whereby plaintiff agreed to erect a wind-mill pump, tower, well, and the necessary conducting pipes, and "to furnish a good supply of water for stock," for two hundred and sixty-five dollars, for which plaintiff was to give her note. He failed to furnish a good supply of water for stock, and the defendant rescinded the contract. We held that this contract was an entirety, and that, because of plaintiff's failure, the defendant had a right to, and did, rescind the contract, and therefore plaintiff was not entitled to recover thereon. The case is distinguished from actions on the *quantum meruit* where there was a partial failure. There were no separate warranties in that case as in this, and no provision that the failure of any part should not affect the payment of the purchase price of any other. It seems to us entirely clear that it was the intention of the parties that this should be a severable contract. We may add that we have examined the evidence, and reach the conclusion that the defendants have failed to show a breach of either of the warranties. There is but little complaint as to the thrasher, and we think the failure of the engine to work as expected, is attributable to

mismanagement, rather than to any defect or want of capacity. The judgment of the district court is **AFFIRMED.**

THE STATE BANK OF TABOR V. H. G. BREWER, Appellant.

Evidence: REFRESHING RECOLLECTION. A cashier of a bank who testifies that he made the entries in the bank books from slips
 1 used in the ordinary course of the bank's business, at the time of the transaction in question, and knew them to be correct, may be permitted to refresh his memory therefrom.

Harmless Error: TAKING EXHIBITS TO JURY ROOM. While an admission in the pleadings, of the execution of a note sued on does not authorize the court to permit the jury to take the note
 3 to their room, unless it is introduced in evidence, yet the fact that it is so taken is without prejudice, where a copy of it is set out in the pleadings which the jury may properly take.

Appeal: RECORDED BELOW: Evidence. The question of the admissibility as evidence, of slips of paper marked as exhibits, is not
 2 raised by an abstract showing that "plaintiff's offer in evidence" said exhibits, and that the objection thereto was overruled.

OBJECTION BELOW. The admission of the testimony of a witness who is permitted to use a memorandum to refresh his recollection,
 1 is not rendered erroneous because he shows, on cross-examination, that he has no independent recollection of the matters testified to, unless a motion is then made to exclude his testimony.

Appeal from Fremont District Court.—HON. A. B. THORNELL, Judge.

THURSDAY, JANUARY 21, 1897.

SUIT on two notes, one of two hundred dollars and the other of four hundred and sixty-five dollars. Defendant Brewer admits the execution of the two hundred dollar note as surety, but says that he was released therefrom by plaintiff, in consideration of his satisfaction of a mortgage held by him on the property of the other defendant, Ramsey. He also alleges that the four hundred and sixty-five dollar note had been

100 576
 122 519
 100 576
 124 680
 100 576
 129 528

executed by Ramsey and accepted by the bank before he (Brewer) signed it, and, therefore, his signature was without consideration; and he also claims that it was obtained by fraud. Trial to jury, verdict and judgment for plaintiff, and defendant Brewer appeals.—*Affirmed.*

Geo. E. Draper and W. E. Mitchell for appellant.

Wm. Eaton and L. A. Hill for appellee.

LADD, J.—In the ordinary course of plaintiff's business, memoranda were made on slips of paper at the time of the transactions, and from these slips its books were made up. Hall, the assistant cashier, testified that he made the entries in the books from the slips at the time of the transactions, and knew
1 them to be correct. He was then permitted, over the objection of the defendant, to refresh his memory therefrom, and testify. On cross-examination he stated that he was simply testifying from the record, and not from memory. The ruling of the court, when made, was correct. If it appeared on cross-examination that the witness, after refreshing his memory, could not recall the matters referred to, the defendant might properly have moved that the evidence already given be stricken from the record.

II. The slips relating to the transactions concerning which evidence was introduced, were marked exhibits, and thereafter the abstract shows that "plaintiffs offer in evidence Exhibits 5, 6, 7, and 8,"
5 and the objection thereto was overruled.

Whether these slips were ever introduced in evidence, or used to the jury, does not appear from

III. Complaint is made of the action of the court in permitting the jury to take to their room the notes on which the action was brought. Admitting the execution of an instrument in the pleadings does
8 not authorize the court to allow the jury to take it to their room, unless it has been introduced in evidence. It is not error, however, for the jury to take with them the pleadings, and it is difficult to understand how the examination of the original instruments by the jury, instead of the copies contained in the pleadings, would be prejudicial to either party. In any event, the defendant in this action was not prejudiced.

IV. Exception is taken to some of the instructions. They are considered in the argument as abstract propositions of law, and not in connection with the facts in the case. As applied to the evidence, they clearly and fully state the law.—AFFIRMED.

**THE CORN PALACE AND INTERSTATE FAIR ASSOCIATION
V. HORNIOK, HESS & MORE, Appellants.**

Practice: REFUSAL TO PERMIT AMENDMENT IN TRIAL. Where the complaint in an action on a subscription sets out a copy of the instrument and the answer admits the signing of "a paper similar to the one set out in the petition." but states that defendant has no knowledge as to whether the one set out is the one signed, and plaintiff thereafter puts in evidence the original subscription list signed by defendant, it was error to refuse to allow defendant to amend the answer by denying that it signed the alleged subscription paper, or that the signature thereon is its signature, on the

ACTION on a subscription. Judgment for plaintiff, and the defendant appealed.—*Reversed*.

J. S. Lothrop for appellant.

No appearance for appellee.

GRANGER, J.—The plaintiff is alleged to be an association organized by H. A. Jandt and other parties, too numerous to mention, for the purpose of building and operating a corn palace and fair in the year 1893, at Sioux City. The following instrument is the basis of this action:

"We, the undersigned, for valuable consideration, hereby promise and agree to donate and give to the Corn Palace and Interstate Fair Association of Sioux City, Iowa, the sums of money set opposite our respective names, said money to be payable in installments at any time on demand of the duly qualified officers or agents of said corporation:

"Name.	Amount.
"Hornick, Hess & More.	\$300.00."

It is averred in the petition that the defendant corporation became a subscriber to the above "subscription list," which was signed by numerous other parties in various amounts. It also appears from the petition that the association, by a board of directors, levied an assessment of forty per cent. on the amount subscribed, which, on demand, the defendant refused to pay. Plaintiff seeks to recover the forty per cent., or one hundred and twenty dollars. The answer is in five divisions, the first of which admits the signing of a paper similar to the one set out in the petition, but says that whether the one set out is the one it signed it has no knowledge or information sufficient to form

a belief, and therefore denies the same. Other denials appear in the same division. Other matters are pleaded in defense, and, among them, that the plaintiff has no legal capacity to sue or be sued. The court sustained a demurrer to the second and third divisions of the answer, after which the cause proceeded to trial to a jury. The plaintiff, during its presentation of evidence, introduced the original subscription list on which the action is based; that set out in the petition being a copy. Thereafter the defendant asked leave to file an amendment to the first division of its answer as follows: "Defendant admits that it is a corporation; denies that it signed the alleged subscription paper set up in petition; denies that the signature thereto of Hornick, Hess & More was signed thereto by defendant; and denies that the same is the signature of said defendant." Leave was refused, and the refusal is assigned as error.

From the record it appears that when the offer of amendment was made it was resisted on the ground that it would contradict the sworn answer on file, because that answer admitted that defendant signed the subscription paper, and by the amendment, if permitted, plaintiff would be taken by surprise. It appears that counsel were in contention as to the effect of the original answer. We are led to think the court adopted the views of the appellee. However that may be, we think the amendment should have been allowed. A reference to the original answer will show that, while admitting that a similar paper to the one set out had been signed, there is care taken to avoid the admission claimed by the plaintiff. It seems from the record that upon a presentation in evidence of the subscription relied on, so that the

to the genuineness of the signature. As a reason why the court should not allow the amendment, the plaintiff suggested, as shown by the record, that it is not alleged in the amendment that the paper was not executed for defendant. The denial in the amendment is as broad as the averment in the petition. If defendant should show the signature not to be genuine, it would defeat a right of recovery, on the record as it is now before us; and counsel for plaintiff stated to the court, before its ruling, that the proposed answer, if true, was a complete defense. Inasmuch as the answer must be verified, and a similar list had been signed, we do not see that the defendant, at the time of filing its original answer, could do different than to state the facts as it did, and plead further when the fact was disclosed as to the signature. For the refusal to permit the amendment the judgment must be reversed.

There are a number of questions presented, and some of them are important in a general way. Where we have no brief for appellee, we do not consider questions not important to a conclusion when there is a reversal. See *Alborn v. Alborn*, 100 Iowa, 382 (69 N. W. Rep. 678), and authorities there cited.—REVERSED.

MRS. PHOEBE LILLIBRIDGE V. GEORGE W. ALLEN AND
JENNIE L. ALLEN, Appellants.

Fraud: CANCELLATION OF DEED. Evidence that plaintiff, who was over seventy years old, hired a real estate broker to dispose of her land, and that he exchanged the same with defendant for a note
1 secured by mortgage on twenty-four lots, and, without plaintiff's knowledge, secured an additional commission from defendant, and that her land was worth two thousand seven hundred dollars, while the mortgaged lots were worth about one dollar each, but that the
4 broker and defendant fraudulently represented to the plaintiff that they were worth two hundred dollars each, and that the trade was made on the faith of such representations, will sustain a judgment setting aside the deed for fraud.

GOOD FAITH PURCHASER. One who purchases from her brother, land
2 which he had procured by fraud is not a *bona fide* purchaser, if
5 the only consideration was an antecedent debt due her for services.

Appeal: NOTICE ON CO-DEFENDANT. A motion to dismiss made by appellee because appellant's co-defendant was not served with
3 notice of appeal, will not be passed upon when it is clear that there should be an affirmance upon the merits.

Appeal from Hamilton District Court.—HON. S. M.
WEAVER, Judge.

THURSDAY, JANUARY 21, 1897.

ACTION in equity to set aside deeds on the ground of fraud and a want of consideration; also, an action to recover certain notes, or their proceeds. Trial to

KINNE, C. J.—I. Though the evidence is conflicting as to some of the facts, we conclude that the court below was justified in finding them to be substantially as follows: In May, 1893, plaintiff resided in Chicago, Ill., and was seventy-four years of age.

1 She owned one hundred acres of land, situated in Hamilton county, Iowa, and worth about two thousand seven hundred dollars. It was rented, and she held two rent notes, not then due, of one hundred and fifteen dollars each. She engaged one Morgan, a broker in Chicago, to sell the land. The defendant, George W. Allen, at the same time owned a note secured by mortgage on twenty-four lots in Pierre, S. D. The note was for two thousand four hundred dollars, and drew interest. It purported to be given to one Prentice by one Billings. By various assignments it had been transferred to the defendant, George W. Allen, who resided at Polo, Ill., and was engaged in the clothing and merchant-tailoring business. He had known Morgan for several years, and the latter had acted for him in at least one transaction. In April, 1893, the defendant George W. Allen wrote Morgan, advising him that he (Allen) had such a mortgage, and wanting him to trade it for land, and promising him a commission in case a deal was made. Morgan advised him as to plaintiff's land, and offering to trade it for the note and mortgage and four hundred dollars cash. Allen replied, offering to trade and pay three hundred dollars cash. At Morgan's suggestion, Allen went to Chicago and met plaintiff and Morgan. While Morgan and Allen deny making any representations to plaintiff as to the value of the Dakota lots, still we think the court was justified in finding, from her testimony and other facts, that both Allen and Morgan represented to plaintiff that the lots were worth two hundred dollars each. Plaintiff made

the trade of the land for the lots and three hundred dollars cash, relying upon the representations as to the value of the lots which she had not seen. After

2 Allen obtained the deed to the land, he sold the same to the defendant, Jennie L. Allen, his sister, for a consideration, as stated in the deed, of ten dollars. It is claimed that the actual consideration was the sum of two thousand five hundred dollars, due to said Jennie from her brother for wages before that time earned. When the note and mortgage was turned over to plaintiff, an interest coupon for one hundred and sixty-eight dollars was past due, and Allen reported to plaintiff that it had been paid. The rent notes not due were turned over to Allen. This action was begun to set aside the conveyance to Allen, and from Allen to his sister, the defendant, for fraud, and because of failure of consideration. Thereafter another suit was begun by her to recover the rent notes, or their proceeds. Both actions were tried together, and a judgment and decree entered in favor of plaintiff, setting aside the deeds, and ordering that plaintiff pay George W. Allen, seventy dollars, being the difference between the three hundred dollars paid by him and the face of the rent notes turned over to him, and said sum was paid. The notes and mortgage were ordered delivered to Allen, and the assignment of them canceled, and defendants adjudged to pay the costs.

II. A motion was made by appellee to dismiss this appeal, because no notice of appeal has been served

plaintiff and the defendant, George W. Allen, for his services. It is not claimed that plaintiff had
4 any knowledge that Morgan was acting as the paid agent of Allen in making the trade. She supposed he was her agent, and looking after her interest. There is reason to believe that Allen and Morgan acted together in consummating a gross fraud upon this plaintiff. The evidence is undisputed that the lots were more than two miles from the business portion of the city of Pierre, and were, at the time of the trade between plaintiff and Allen, worth not over one dollar each. We do not, in such cases, enter into a detailed discussion of the evidence. Enough has been shown to establish a case of fraud,
5 which fully justified the decree of the district court. We do not think the grantee and defendant, Jennie L. Allen, took her deed in ignorance of all of the facts. Her relationship with the defendant, the fact that no account was kept of the wages for which it is claimed this deed was executed, though the grantee was in the employ of the grantor, and other facts, convince us that she was cognizant of all the facts relating to the value of the lots, and a willing party aiding in the perpetration of the fraud. If, however, we should be mistaken as to that, still, under the law, she is not a *bona fide* purchaser. Whatever her rights may be as against her immediate grantor, it is clear that she did not acquire an interest in this land superior to plaintiff's claim thereon. She parted with no security, she surrendered no evidence of the debt, and parted with nothing of value. The entire consideration, if any, was the payment of this antecedent debt, due for wages for services rendered her brother. A holder of a conveyance under such circumstances, takes the interest conveyed subject to prior equities attaching to the land. 2 Devlin, Deeds, pt. 815, note 1; *Sillyman v. King*, 36

Iowa, 207; *Throckmorton v. Rider*, 42 Iowa, 85; *Light v. West*, 42 Iowa, 141; *Anderson v. Buck*, 66 Iowa, 496 (24 N. W. Rep. 10); Bump, *Fraud. Conv.*, p. 493. The decree of the district court is **AFFIRMED**.

W. D. CLAPP V. J. A. GREENLEE, Appellant.

Rescission: DEFENSE OF WANT OF DAMAGE. It is no defense to a
1 *bill to rescind a deed for mistake* as to the subject-matter, that the tract actually conveyed is worth as much as the one plaintiff contracted to buy.

OFFER AND TENDER. It is no defense to a *bill to rescind a deed for*
3 *mistake*, as to the subject-matter, that plaintiff allowed the land to go to tax sale and had mortgaged it, where the complainant tendered a re-conveyance free from incumbrance.

Laches: TENDER HELD SUFFICIENT. A suit to rescind a deed for
2 *mistake* in the subject-matter is not barred by laches, where the
1 transaction took place in 1887, and plaintiff did not discover that
4 he had received the wrong land until 1890, and, after fruitless negotiation with defendant for settlement, brought action in April, 1891, for fraud, and did not discover the mistake until defendant filed his answer, in October, 1891, and amended the complaint in the following November, so as to seek a rescission for the mistake.

ELECTION OF REMEDIES: *Fraud and mistake.* The beginning of an
5 action for fraud in an exchange of land is not an election to affirm the contract, which will prevent plaintiff, on subsequently discovering that there was no fraud, but a mistake as to the tract which he was to receive, from amending the complaint so as to seek a rescission for such mistake.

STATUTE OF LIMITATIONS: *Discovery.* A suit to rescind for mistake
10 is not barred by limitations, though not brought within the statutory time, if plaintiff did not discover the mistake until one month before bringing the suit.

show that the action was barred. It refused plaintiff leave to
7 rebut this. *Held*, In view of the fact that plaintiff prevailed, and
of the presumption that the court below did not commit error,
8 involved in refusing such rebuttal, it will be the theory of the
decision on appeal, that the offer of statutes was disregarded. If
9 this be not so, this court, in view of the fact that rebuttal was not
permitted, will exercise the right of excluding such evidence, even
as the district court might have done, and this though its admis-
sion below might have been discretionary.

Appeal from Keokuk District Court.—HON. D. RYAN,
Judge.

THURSDAY, JANUARY 21, 1897.

ORIGINALLY, this was an action at law to recover damages from defendant for certain false and fraudulent representations made by him with reference to some Nebraska land, which he exchanged with plaintiff for some land in Iowa. The defendant answered, denying that he made any false or fraudulent representations regarding the Nebraska land, and further pleading that the representations he made were not fraudulent, but made through mistake as to the tract of land which he in fact owned and traded to plaintiff. Defendant also pleaded a counter-claim, based upon certain false and fraudulent representations made by plaintiff concerning the Iowa land. After the filing of the answer the plaintiff amended his petition, and asked for a rescission of the contract of exchange by reason of mistake as to the subject-matter. In this amendment he offered to execute a deed to defendant re-conveying the Nebraska land to him

sustained, and defendant excepted. In answering the amendment to the petition, defendant averred that it was impossible for him to rescind, because he had conveyed the Iowa land to a good-faith purchaser. He further alleged that the Iowa land had much increased in value since the exchange was made, while the Nebraska land had increased but little, if any, and that it would be a hardship to now decree a rescission. Defendant also pleaded that the contract of exchange was made in the state of Nebraska, where both parties were at the time living, and that plaintiff's cause of action is barred by the statute of limitations of that state. The statute relied upon is pleaded by the defendant in his answer. Afterwards defendant filed an amendment to his answer, in which he alleged that plaintiff is not the owner of the Nebraska land; that the same had been sold for taxes to one A. E. Hunt, who was, at the time of the commencement of this suit, the owner of the real estate deeded to plaintiff. He further averred that, after receiving the Nebraska land, plaintiff executed a mortgage thereon, which had not been satisfied at the time this amendment was filed, and he relied upon these facts to defeat plaintiff's suit for rescission. Plaintiff also amended his petition by stating that he did not discover that the Nebraska land for which he traded was not the same as that pointed out to him by defendant at the time of the exchange, until June, 1890, and that he then wrote to defendant regarding the matter, and asked him to make it right: that

thereto from Hunt, the purchaser at the tax sale, a copy of which deed he attached to the reply. He also pleaded that he had full power and ability to re-convey the Nebraska land, free and clear of all incumbrances, to defendant, should a decree of rescission be granted, and that he could fully restore to defendant the real estate which the defendant deeded to him, should the court so order.

The cause on the issues thus joined was by the court set down for hearing on depositions, and on the sixteenth day of December, 1892, was submitted to the court, to be argued in writing and decided in vacation as of the term at which it was submitted. Afterwards, and in May, 1893, the court rendered a decree finding the equities to be with plaintiff, and ordering a rescission of the contract, and directing each party to make a deed to the other of the land he had received in exchange, by the first of the next term of court, and that all parties having any interest in the land be brought in at this next term of court, in order that their rights may be adjudicated; and the cause was continued for such other or further decree or judgment as might be necessary. The record recites that, on the twenty-seventh day of September, 1893, the plaintiff in open court tendered deeds and abstracts, with release of mortgage appearing unsatisfied, and offers to record said release. And on the same day plaintiff filed a motion to re-submit the cause in which he alleged that he was ready and willing to make rescission on his part, and that the defendant was unable to rescind; and he asked that the cause be re-submitted, in order that the court might determine the amount of damages to which he was entitled; and he further asked for an order to take additinal

originally offered and other additional evidence taken on this second submission. Thereafter, and before final decree, plaintiff amended his petition, in which he alleged that he had paid taxes on the Nebraska land for the term of seven years, amounting to one hundred and twenty-two dollars and twenty-four cents, in order to keep himself in position to rescind, and he asked that the amount so paid by him be allowed as damages from defendant. Defendant also amended his answer by stating that, in the exchange, he paid plaintiff two hundred and fifty dollars in cash; that amount representing the difference between the agreed values of the property exchanged. He also pleaded that the Iowa lands were sold under a decree of foreclosure rendered upon a mortgage existing upon the land when he received it from the plaintiff, and he asked that, in fixing the difference in value of the Iowa and Nebraska lands, defendant have credit for the sum for which the Iowa land sold on execution, and the "boot money" paid by him. Thereafter, and on the twenty-ninth day of June, 1895, the court rendered a further decree, finding that the defendant could not comply with the order of rescission, and that plaintiff had tendered him (defendant) a good and sufficient deed for the Nebraska land, and had paid the taxes claimed by him; and the court ordered that plaintiff have judgment for the value of the Iowa land, less the amount of incumbrance which existed thereon at the time of the exchange, and for the taxes paid by him on the Nebraska land. The court also found that the value of the Iowa lands at the time of the exchange was six thousand

of six per cent. on the value of the land he conveyed to defendant, less incumbrance and "boot money," to which there should be added the one hundred and twenty-two dollars and twenty-four cents taxes paid by plaintiff; and judgment was ordered for plaintiff for the sum of three thousand two hundred and seventeen dollars and sixty-one cents and costs, and it was further ordered that, upon payment of this sum, defendant should be entitled to have and recover from plaintiff a deed for the Nebraska land, with tax receipts showing all taxes, up to and including the year 1893, fully paid. The court further ordered that, if plaintiff failed to do so, he should not receive or enforce the collection of any part of the judgment. It also decreed and ordered that, upon compliance with the decree by plaintiff, and a failure of defendant to satisfy the judgment within sixty days from July 1, 1895, plaintiff might elect to retain the Nebraska land by crediting the value thereof, which was found to be one thousand six hundred dollars, and the taxes paid by him thereon,—in all, one thousand seven hundred and twenty-two dollars and twenty-four cents,—upon the judgment against the defendant; and the cause was continued for further orders and the enforcement of the decree. Thereafter, the plaintiff filed a motion to confirm the decree and to enter judgment thereunder for the value of the land, in which he alleged that he elected to retain the Nebraska land and credit the value thereof upon the judgment against defendant, as provided in the decree last mentioned. He further averred that he had fully complied with the decree on his part by delivering to the clerk a deed to defendant for the Nebraska land, an abstract showing the same to be free and clear of incumbrances, and tax receipts showing payment of

and judgment entered thereunder. He further stated that the time had passed which had been granted defendant for satisfying the judgment, and that he elected to retain the Nebraska land, and give the credit therefor on the judgment, as per the order of the court. Accompanying this motion were the deed and tax receipts referred to. This motion was submitted, and the court found the recitals therein to be true, and ordered that the decree of June 29, 1895, be confirmed, and that there be credited upon the judgment the sum of one thousand, seven hundred and twenty-two dollars and twenty-four cents, in accordance with plaintiff's election. To each and all of these orders, decrees, and judgments the defendant excepted, and now appeals to this court.—*Affirmed.*

C. H. Mackey and Woodin & Son for appellant.

Raney & Simmons and C. M. Brown for appellee.

DEEMER, J.—The unusually long statement preceding this opinion seems to be necessary to properly understand the questions presented for our determination. The exchange of land referred to in the pleadings was made in Nebraska, on or about the nineteenth day of April, 1887, and it is practically undisputed that the parties made a mistake as to the subject-matter of the trade. The plaintiff and defendant went to see the Nebraska land which defendant claimed to own, it being the west one-half of section

No. 15, in township No. 2 N., of range 14 W.

1 The defendant, by mistake, pointed out the east half of the section as his land, and plaintiff

to be valuable by the parties. There are no water privileges on the west half. There are some other things connected with the land which made the east half the more valuable of the two tracts. Some of the witnesses place the difference in value at one thousand dollars. Plaintiff did not discover the mistake until June, 1890, when he went to improve the land. Some correspondence then passed between the parties with reference to the matter, but no adjustment was had, and then plaintiff commenced his suit, filing his original petition on the first day of August, 2 1891. Defendant claims, and introduced evidence to show, that one tract of Nebraska land was as valuable as the other, and that, if there was any difference, it was in favor of the west half of the section; and he insists that, if this be true, plaintiff is not entitled to rescind. It is likely true, that proof of such facts would be a complete defense to an action at law for fraud. But it is clear that it is not sufficient to defeat an action for rescission based upon mistake as to the subject-matter. Plaintiff had the right to receive just what he contracted for, and, if there was a mistake as to the subject-matter, then there was no meeting of the minds,—no contract between the parties. Under such circumstances a court of equity will, in a proper case, declare a rescission of the contract, although no damage would have resulted to plaintiff had he been content to abide by the trade. It is not a question of comparative values, but of mistake in the subject-matter, which invalidates the transaction. No citation of authorities is needed to support so elementary a proposition. It follows, then, that plaintiff is entitled to a rescission of the contract for mistake as to the subject-matter unless there be something else in the case 3 which defeats his action. Defendant contends that plaintiff is not entitled to rescission, because he

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allowed the Nebraska land to go to tax sale, and also incumbered it with a mortgage, after he received the deed therefor. It will be noticed that plaintiff, in his petition and amendments thereto, offered to re-convey the Nebraska land, free and clear of all incumbrances, to the defendant, if the court so decree. As the suit was properly in equity, it was not incumbent on plaintiff to do more than make this offer. The court could, by proper orders, protect the defendant; and this it did in the decrees rendered. A statement that plaintiff was ready and willing to furnish and convey a clear title to defendant in the event a rescission was declared, was all that was necessary. The rule is different in actions at law, but this, as we have said, is not a law suit. *Montgomery v. Shockey*, 37 Iowa, 107; *Seymour v. Shea*, 62 Iowa, 708 (16 N. W. Rep. 196); *McCorkell v. Karhoff*, 90 Iowa, 545 (58 N. W. Rep. 913); *Taylor v. Ormsby*, 66 Iowa, 112 (23 N. W. Rep. 288); *Binford v. Boardman*, 44 Iowa, 53. It is said, however, that plaintiff did not, in fact, tender a deed and proper evidence of a clear title to the Nebraska land, in accordance with the orders of the lower court. We think, however, that the record does show, not only a willingness on the part of plaintiff to restore to the defendant the Nebraska land free and clear of all incumbrance, but an actual tender, not only of a warranty deed, but a deed from Hunt, who held the tax title on the land, a release of the mortgage executed by plaintiff thereon, proper evidence that all taxes had been paid, and an abstract of title showing the land free and clear of all incumbrance. The originals of some of these papers have been filed in this court for inspection, and we find them to be as appellee claims. Moreover, the defendant did not exercise the election he had to take the Nebraska land. On the contrary, he refused to perform that part of the decree which entitled him to a re-conveyance;

and compelled plaintiff to elect to take the land and credit the value thereon as fixed by the court upon his judgment. We think the tender and offer made by the plaintiff was sufficient.

II. Defendant claims that plaintiff's right of action is barred by his laches. The evidence shows that plaintiff did not discover that he had received a deed to the wrong land until June, 1890. He
4 then had some negotiations looking to a settlement with the defendant, but these amounted to nothing, and he then, in April, 1891, commenced his action at law to recover damages for fraud. He did not learn of the mistake until defendant filed his answer, on October 31, 1891. On the sixteenth day of November following, the plaintiff filed an amendment to his petition, asking for rescission on the ground of mistake. We do not think there was such delay after the discovery of the mistake as defeats him of his remedy. It is true that unreasonable or inexcusable delay on the part of him who has the right to rescind, will amount to a waiver, and that one who has the right to repudiate must do so within a reasonable time after he has knowledge of the existence of the cause, or sufficient knowledge to put him upon inquiry as to the fraud, or mistake. But we think this case is barren of such facts as ought to defeat plaintiff on the ground of delay in proceedings.

III. It is also claimed that plaintiff, by commencing his action at law, elected to stand by the contract, and that he cannot be allowed to plead mistake. This contention is squarely answered by
5 the case of *Smith v. Bricker*, 86 Iowa, 285 (53 N. W. Rep. 250), and we need give it no further attention.

IV. Defendant also claims that the suit is barred

exchange was consummated in that state. Defendant pleads the statutes of the sister commonwealth in bar of plaintiff's action, and claims that the action was barred within four years from the time the exchange was made. The record with reference to this matter, is somewhat peculiar. On the twenty-third of January, 1892, an order was made that the cause be heard on depositions. On the sixteenth day of December, of the same year, the cause came on for hearing, and each party offered and introduced the depositions he had taken. Up to this time no notice had been given by defendant that he intended to introduce the statutes of the state of Nebraska. At the time of the introduction of the depositions, defendant produced one C. H. Mackey, as a witness, and proposed to examine him orally. Thereupon plaintiff objected, because the case was set down for trial on depositions, and oral evidence was inadmissible. The court made this order upon the objection: "Taken, subject to objection, to be determined with the case." The witness thereupon identified a certain book purporting to be the Compiled Statutes of the State of Nebraska. Defendant then offered certain sections of this book, with reference to the statute of limitations, in evidence. His offer was of sections 5-16, inclusive, found on pages 853-855. To this book the plaintiff offered objections, and the same ruling was made by the court that it made upon the previous objections to Mackey's evidence. It may be well to state that, before the cause was called for hearing, and on the ninth day of

This motion was supported by affidavits, showing that certain evidence in rebuttal was in existence, and that no notice was ever given plaintiff of the filing of defendant's evidence. This motion was overruled the day the cause was called for trial. After the submission of the case, and while it was still in the hands of the court, the plaintiff, on the twenty-first day of February, 1893, filed a motion to set aside the submission, for the reason that the case was triable on depositions only, and that, at the time of the submission, and after the court had refused a continuance asked for by plaintiff, the defendant introduced certain documentary and parol evidence; this being the evidence of Mackey and the Nebraska Statutes, before referred to. We do not find that any ruling was ever made upon this motion, unless it be comprehended in some of the decrees rendered by the court below. But, from the facts found and the decrees as entered, it appears to be quite certain that the court, in considering the case and making the decrees and orders it did, virtually sustained plaintiff's objections to the testimony of Mackey and the statutes of the State of Nebraska, although it must be conceded that no such order was expressly made of record.

At the time of filing the motion to set aside the submission, the plaintiff filed an amendment to his petition to conform it to the proof, in which he alleged
that the defendant became a non-resident of
7 the state of Nebraska in January, 1889, and
that he has ever since been such non-resident,
and that the statute ceased to run at the time the defendant left the state where he formerly resided. The plaintiff claims in argument that, had he been allowed to do so, he could have shown by competent proof that by the statutes of the sister state that their operation is suspended during the time of the defendant's

absence from that state. He further contends that there is no showing that the laws of Nebraska, with reference to absence from the state, are not the same as in this state, and that, in the absence of evidence, they are presumed to be the same; and he finally insists that the amendments to his petition relate back to the time of the filing of the original, and that his suit was commenced in time. We do not find it necessary to pass upon but one of these claims. If we be mistaken in our view of what the court held with reference to the evidence of Mackey and the Nebraska statutes, it is nevertheless true that the case is triable here *de novo*, and we are to consider only such evidence as we believe to be offered at a proper time, and competent and relevant to the issues. Now, while the lower court might, in the exercise of a sound discretion, have allowed this evidence with reference to the statutes of limitations to be introduced orally,

8 and without notice to the plaintiff, yet in view of the time at which it was offered, it should not have been received at the time it was offered without allowing the plaintiff an opportunity to rebut it. No notice had been given plaintiff previous to the hearing, that defendant would introduce this documentary evidence; and the same may be said with reference to the tax deed to Hunt, and the mortgage executed by plaintiff on the Nebraska land; and no effort was made to take the deposition of the witness Mackey before the day of trial. As we understand the practice in such matters, it is incumbent on either party desiring to offer documentary evidence, where the case is ordered to be submitted on depositions, to give notice thereof to the opposite party; and while the court may, in the exercise of a proper discretion, permit such evidence to be offered at the trial, and may also allow oral testimony to be

taken, yet it ought to allow the other party to rebut such evidence when it is received. Presuming, as we must, in favor of the regularity of the proceedings of the trial court, it follows that he must have sustained the objections to the evidence now under consideration; else he would have permitted plain-

9 tiff to have offered evidence in rebuttal. But, as we have already said, if this be not true, we are constrained to hold, in view of the record made, that such evidence can not be considered on this appeal, for the reason that the objection to the evidence should have been sustained. It is well settled practice for trial courts, in equity cases, to make no ruling on objections to evidence, and the failure of the court to do so in this case is not unusual. The case comes to us with the objections interposed by counsel in the record, and we make such rulings thereon as ought to be made. It follows, then, that we cannot consider the Nebraska statutes, and must look to the law of this state, which is presumed to be

10 the law of Nebraska, to determine whether the action is barred. The action is not barred under our law, for two reasons: *First*, because the plaintiff did not discover the mistake until a short time before he filed his amendment to the petition; *second*, because the undisputed evidence shows that defendant removed from the state of Nebraska in January, 1889, and has since been absent therefrom. The running of the statute is suspended during the time the defendant was absent from Nebraska. The action was not barred here, because sufficient time had not elapsed at the time the amendment to the petition was filed. Our conclusions on this branch of the case find some support in the following cases: *Gardner v. Trenary*, 65 Iowa, 646 (22 N. W. Rep. 912); *Sweet v. Brown*, 61 Iowa, 669 (17 N. W. Rep. 44); *Harlan v. Porter*, 50 Iowa, 446;

Blough v. Van Hoorebeke, 48 Iowa, 40; *Hasner v. Patterson*, 70 Iowa, 681, (28 N. W. Rep. 493); *Cook v. Smith*, 50 Iowa, 700; *Van Bogart v. Van Bogart*, 46 Iowa, 359; *Putney v. O'Brien*, 53 Iowa, 117 (4 N. W. Rep. 891).

V. Defendant contends that the judgment is for more than the amount claimed in the petition. The original petition asked judgment for one thousand five hundred dollars and interest. The judgment was for one thousand six hundred and seventeen dollars and sixty-one cents. One thousand five hundred dollars, with interest at six per cent. from August, 1891, amounts to more than the court awarded.

VI. Appellant also says there is no method of arriving at the judgment by any mathematical computation. We cannot agree with him in this. It is not necessary to set out the figures. Sufficient is it to say that we discover no error. The judgment and decree of the district court are right, and they are **AFFIRMED.**

WILLIAM BALLINGER AND A. J. MATHIAS, Executors of
the Last Will of A. L. CONNABLE, Deceased,
Appellants, v. ALBERT E. CONNABLE.

Wills: ADVANCEMENTS: Construction. A provision in a will that the "actual cash value" of lands given to the testator's sons by way of advancement, shall be considered its value, if no sum is named, does not apply to an advancement to a son by deed reciting a consideration of one dollar and love and affection, where the

THIS appeal is by the executors of the last will of A. L. Connable, deceased, from a ruling sustaining an exception to their report, made by Albert E. Connable, one of the devisees.—*Affirmed.*

James C. Davis for appellants.

James H. Anderson and *I. N. Wagoner* for appellee.

GIVEN, J.—I. The will upon which this contention arises is the same will considered in the case of these executors against Edwin H. Connable, one of the devisees, appellant, affirmed December 10, 1896. 100 Iowa, 121 (69 N. W. Rep. 438). Said will contains the following: "I, A. L. Connable, being of sound mind and memory, knowing the uncertainty of life, desiring to settle my estate upon my three sons, Albert E. Connable, Howard L. Connable, and Edwin H. Connable, in equal parts, share and share alike, with as little trouble as possible, do make and ordain this, my last will and testament. I hereby nominate and appoint A. J. Mathias and William Ballinger executors of this, my last will and testament. I desire that my estate shall be considered as including all advancements which I have heretofore made to each of my three sons, for the purposes of division, and that the principal amount advanced by me to each, without any interest thereon, be considered as part of my estate in their hands, respectively, whether same be evidenced by note, book account by me, receipt or conveyance of real estate; the consideration named in the conveyance to be considered, for the purpose of settlement, the amount of advancement, or, if no sum is named, the actual cash value of the same at the time of the division of the estate shall be considered its value. After my debts are paid, and expenses of

settlement of the estate and any bequests which I may make by codicil hereto provided for, it is my desire that all my estate be divided equally, share and share alike, between my three sons, Albert E. Connable, Howard L. Connable, and Edwin H. Connable; the property may be divided in kind, the executors making such division, and designating the part to each, having regard to the preferences or wishes of each, so as to give to each an equal share therein, making transfers of personal assets and conveyances of real estate, for which purpose the title to the real estate is hereby conferred to them, of all the real estate of which I may die seized; their decision to be final." To this two codicils are made, that need not be further noticed. Among the advancements made to appellee, Albert E. Connable, was a conveyance of a certain two hundred and sixty-eight acre farm in Hancock county, Ill. The deed was executed October 21, 1885. Albert executed to his father a writing acknowledging the receipt of this conveyance, which writing, after describing the land, concludes as follows: "Which said property is estimated as of the value of ten thousand, seven hundred and twenty dollars, which said sum, as an advancement to me from the estate of my father, I, Albert E. Connable, do hereby acknowledge receipt of, and upon his estate, should he die intestate, I am to be charged with said amount as having been received by me, and I am to be chargeable with in my share of the estate. Witness my hand and seal, this twenty-sixth day of December, 188-. Albert E. Connable. [Seal.] January 22, 1886." The executors reported that, as A. L.

excepted, upon the ground that said deed and receipt were simultaneous, and together constitute the contract, and fix the consideration at ten thousand, seven hundred and twenty dollars, and contends that the executors have no right to charge him any greater sum.

II. The deed recites a consideration of one dollar and love and affection. It is not disputed, however, that this is as if no sum was named. Therefore, taking the deed alone, it would come under that provision in the will that, "if no sum is named, the actual cash value of the same at the time of the division of the estate shall be considered its value." The receipt from Albert to his father was evidently executed and delivered as a part of the same transaction, and therefore the two instruments must be considered together. Thus considered, it is entirely clear that ten thousand seven hundred and twenty dollars is the sum named as the advancement to be charged to Albert. It was in consideration of Albert's agreement to accept the conveyance at that sum as an advancement that it was made. Taking the deed and receipt together, it is apparent that this consideration was named. Therefore, if nothing further appeared, this sum must control in the division of the estate. It will be observed that, by the receipt, Albert acknowledged the receipt of this advancement to be charged in that sum should his father die intestate. Appellants contend that the testator reserved to himself the right to thereafter provide by will a different value to be put upon said advancement, and that, having died testate, his will must control. This contention may be conceded; yet the question remains: Does the will show that the testator intended that a different sum than that named in the receipt should be charged on account of the advancement? The testator knew the sum to which he had required Albert's consent, and to which he

had consented, as the consideration for the conveyance. His will is that, "if no sum is named, the actual cash value of the same at the time of the division of the estate shall be considered its value." We have seen that a sum is named. Therefore this clause of the will does not apply, and there is no provision in the will for dividing the estate upon any other basis than the consideration named, except where no sum is named. We find nothing in the will to indicate an intention upon the part of the testator that Albert should be charged on account of this advancement in any other sum than that named, to-wit: ten thousand seven hundred and twenty dollars.

III. Authorities are cited to the effect that where discretion is given executors under a will, it cannot be controlled by the courts, unless there be a refusal to exercise it, or fraud in its exercise. It is argued that, as these executors have acted in good faith in this matter, the court has no power to interfere with their discretion. Where the thing to be done is fixed by the will, they have no discretion, but must do that which the will requires. We have seen that, in the view we take of this will, it requires that Albert E. Connable shall be charged with ten thousand seven hundred and twenty dollars on account of this advancement. Therefore, the executors have no discretion to exercise as to the amount. Our conclusion is that the judgment of the district court must be **AFFIRMED**.

H. I. SMITH v. W. C. CLARK, Sheriff, Appellant.

Levy: PROCEEDS OF MORTGAGE: Lien. Where a mortgagee permits
 1 the sale of mortgaged property, and that notes may be taken for
 2 the same in the name of the mortgagor, it being agreed that said
 4 notes shall be applied on the mortgage debt, he has no lien on the
 notes, as against a creditor of the mortgagor, who levies upon
 them while in the latter's possession, without notice of such agree-
 ment.

SAME: Notes in locked safe. A levy on a safe, which is locked, and
 8 its contents, described in the return as "notes and money and
 books," is a good levy on notes payable to the execution defendant
 contained in the safe.

Acknowledgment: INTERESTED NOTARY: Corporations. An acknowl-
 5 edgment of a mortgage, taken by a notary public who is a stock-
 holder in a bank which is a beneficiary under the mortgage, is
 void.

SAME: Record notice. The record of such mortgage is not construct-
 6 ive notice to a sheriff who levies an execution on the mortgaged
 property.

*Appeal from Cerro Gordo District Court.—HON. JOHN
 C. SHERWIN, Judge.*

THURSDAY, JANUARY 21, 1897.

ACTION in equity to establish a lien on personal
 property. There was a hearing on the merits, and a
 decree which was in part in favor of each party, and
 both appeal, the defendant being the appellant.—
Modified and Affirmed.

Blythe, Markley & Smith for appellant.

Richard Wilber for appellee.

ROBINSON, J.—On the fifth day of October, 1892,

100	606
118	217
100	606
116	680
100	606
125	508
100	606
130	474
100	606
137	10

thousand dollars payable sixty days after its date. On the twenty-sixth day of the same month, Bush executed to the plaintiff an obligation, in the sum of three thousand five hundred dollars which was to be void on condition that Bush should pay the First National Bank of Mason City, all notes, overdrafts, and indebtedness of every kind which he should be owing the bank at any time, and should also pay the plaintiff all debts and obligations which obligor might owe to him; and all this was to be performed within one year from the date of the obligation. To secure the performance of that undertaking, Bush gave to the plaintiff a chattel mortgage on a stock of machinery, machine supplies, buggies, wagons, harrows and other agricultural implements, office fixtures, and furniture, and "also all book accounts, and all accounts due or hereafter to become due." The mortgage provided that the mortgaged property should remain in the possession of Bush until default in the performance of conditions the mortgage was designed to secure, unless the mortgagee should deem himself unsafe. The mortgage was recorded in a chattel mortgage record book of the county. On the first day of November, 1892, Bush gave to the bank a note for the sum of one thousand four hundred dollars, due thirty days after its date. On the eleventh day of October, 1894, nearly two thousand dollars were due on these notes, and both had been then transferred to, and
1 were owned by the plaintiff. After the chattel mortgage was given as stated, Bush sold portions of the mortgaged property and received in payment eight promissory notes, made payable to himself.

served them on the same day, by levying upon a quantity of agricultural implements and other articles, including property described in his return as "one Hall's safe, and contents, being notes and money and books, seven sets of oscillating bobsleds." On the next day the defendant released all the property he had levied upon, excepting the safe, the notes, and money contained therein, and the bobsleds, and at a later time, he released the safe. The plaintiff claims that the eight notes to which we have referred were taken under an agreement between the plaintiff and Bush, that they were to be held in trust in lieu of the mortgaged property for which they were given, that the bobsleds, were covered by the mortgage, and that the defendant knew these facts when the levies were made. The plaintiff asks that he be decreed to have an equity in and lien upon the eight notes and the bobsleds, superior to the rights of the defendant under the executions, that the defendant be required to surrender the property, and that it be applied in the satisfaction of the debts due the plaintiff. The defendant admits the taking of the property as stated, but denies that he had any knowledge of the alleged rights of the plaintiff thereto when the levies were made, and avers that the plaintiff, by permitting Bush to deal with the mortgaged property as his own, and permitting him to use it for the payment of his debts to others, has waived his alleged right thereto. The district court found that the notes were held by Bush in trust for the plaintiff, and adjudged him to be entitled to recover them or their proceeds, and established a lien thereon in his favor, superior to the levies under the executions, and provided means of enforcing it. From that portion of the decree the defendant appeals. The court also found and adjudged that the record of the mortgage did not impart constructive notice to the defendant,

that the executions were levied by him upon the bobsleds without notice of the mortgage, and that he was entitled to hold them. From that part of the decree the plaintiff appeals.

I. It is claimed by the plaintiff that at the time the mortgage was executed, but after it was signed, it was verbally agreed between him and Bush that, when the latter sold property covered by the mortgage, he was to deliver the proceeds to the bank, to be applied on his debt to it. The defendant objects to evidence of that agreement, on the ground that the parties reduced their contract to writing, that the writing appears to be complete, and that it must be presumed to express fully the contract actually made. It is shown that, after the mortgage was given, Bush did, from time to time, turn over to the bank, notes which were taken on account of sales; and an agreement, independent of the mortgage, to turn over the proceeds of the mortgaged property when they aggregated a considerable amount, may, perhaps, be inferred from the established course of dealing of the parties, even though evidence of a verbal agreement to that effect, made at the time the mortgage was given, be incompetent. But, at most, it was an agreement which permitted Bush to sell the mortgaged property, and required him to account for its proceeds. The proceeds in question were in the form of promissory notes, which were not covered by the mortgage, and of which the defendant did not have notice until after he had taken the safe and its contents under the executions. The agreement upon which

Iowa, 282 (61 N. W. Rep. 378); Id., (68 N. W. Rep. 690). In that case the mortgagor of personal property was authorized to sell the property under an agreement which, it was claimed, required him to apply the proceeds in paying the mortgage debt; but it was held that such an agreement did not make the mortgagor the agent of the mortgagee for the sale of the property, nor impress the proceeds of the sale with the character of trust funds. What is thus said is applicable to the facts in this case. The most that can be said is that the mortgaged property was sold under an agreement on the part of the mortgagor that he would apply the proceeds of the sale on the mortgage debt, but that agreement was not performed. The case is not governed by the rule which controlled *Maxwell's Estate*, 83 Iowa, 591 (50 N. W. Rep. 56), and

3 other cases cited by the appellee. When the sheriff levied upon the safe and its contents, the safe was locked, and he was unable, at the time, to take possession and make an inventory of the contents. That fact did not defeat the levy, however. The contents of the safe, including the notes in suit, were in the possession of the sheriff, through his possession of the receptacle in which they were

4 stored. It is proper to add that when the levy was made the defendant did not have any knowledge of the claims of the plaintiff to the notes. We conclude that the defendant obtained a valid lien upon the notes, by means of the levies made, superior to any interest therein which the plaintiff may have, and that the decree of the district court with respect to them is erroneous.

the beneficiaries of the undertaking of Bush which the mortgage was designed to secure. It is the rule
5 in this state that a person having a beneficial interest in an instrument as grantee or obligee is disqualified to take and certify an acknowledgment of it. It was held in *Wilson v. Traer*, 20 Iowa, 231, that a notary public cannot take an acknowledgment of a chattel mortgage given to a co-partnership of which he is a member. That rule was followed in *Bank v. Radtke*, 87 Iowa, 365 (54 N. W. Rep. 435). And see 1 Am. & Eng. Enc. Law (2d Ed.) 493, and note. The owner of capital stock of a private corporation has an interest in its property, and in the securing and collecting of money which is due to it. *Bank v. Owen*, 52 Iowa, 107 (2 N. W. Rep. 980). See, also, Mechem, Pub. Off., section 517; Cooley, Const. Lim., 506; Elliott, Gen. Pract., sections 210-212. We conclude, there-
6 fore, that the acknowledgment of the mortgage in question was void because taken by a stockholder of one of the beneficiaries, the payee of the notes in suit, and that the record of it did not impart constructive notice to the defendant. It is not shown, or claimed, that he had actual notice of it when the levies were made; hence, the lien acquired under the executions is superior to that which the plaintiff holds under the mortgage. It is urged that before the defendant had made a valid levy upon any of the property in question, he was informed of the rights of the plaintiff, but we do not think the evidence sustains the claim. It follows, from what we have said, that so

JOHN W. KASSING v. W. W. ORDWAY, Intervener,
Appellant.

100	611
101	663
100	611
106	907
100	611
121	461
100	611
137	118

Purging Usury. The parties to a usurious note indorsed upon it that
4 a stated sum had been paid for all usurious interest in that and
another note. It was testified that this was done to purge usury.
Held, it was error not to charge that usury might thus be purged.

INTEREST: Usury—change of statute. In an action on a note made
5 before the passage of Acts, 1890, reducing the legal rate of
interest, an instruction which permitted the inference that the
note would draw only the reduced rate, after the passage of the
act, was erroneous.

USURY: Jury question. Where a person buys a machine, and sells it
6 to another at an advanced price, and takes his note for it, it is a
question for the jury whether the transaction was a device to
cover usury.

Offer to Compromise: JURY QUESTION: Evidence. A conversation
admitted in evidence, should not be withdrawn from the jury on
8 the ground that it was in the nature of an offer to compromise,
although the testimony of some of the witnesses shows that it
was a mere offer to compromise, where the testimony of others
shows that it contained unqualified admissions of indebtedness
by the debtor, without anything to indicate that it was an offer to
compromise.

Intervention: TRANSFER TO EQUITY. A motion by the intervener to
2 transfer the cause to the equity docket for trial, is properly denied
where the action was properly commenced at law, and the relief
asked by plaintiff was within the jurisdiction of the court of
law, only part of the relief asked by intervener is of an equitable
character, and where the transfer would delay the main action.

Appeal: TRANSCRIPT: Certification—Bill of exceptions. The evi-
dence will not be stricken from the record, on appeal, on the
1 ground that the official shorthand reporter's transcript of the
shorthand notes was not duly authenticated, where an amendment
to the abstract shows that a sufficient bill of exception, was prop-
erly filed, and that the translation of the shorthand notes was
duly certified within the time allowed by law.

Appeal from Monona District Court.—HON. A. VAN WAGENEN, Judge.

FRIDAY, JANUARY 22, 1897.

ACTION at law commenced against the defendants, Walters Bros., to recover an amount alleged to be due from them for corn sold and delivered. The defendants admitted the purchase of the corn, and that payment for it had not been made, but alleged that the corn was raised by plaintiff on land he had leased from W. W. Ordway, and that Ordway had a landlord's lien on the corn for unpaid rent, and, in addition, a chattel mortgage, which was also unpaid. They averred that they were unable to determine who was entitled to the purchase price, and paid it into court for the party who should be found to be entitled to it. Ordway intervened, and pleaded various claims against the plaintiff, and a right to the proceeds of the corn. There was a trial by jury, and a verdict and judgment in favor of the intervener, and also in favor of the school fund of Monona county. The intervener appeals. No question was made in regard to the liability of the defendants.—*Reversed.*

Charles Mackenzie, Mackenzie & Dewey, and T. B. Lutz for appellant.

McMillan & Kindall for appellees.

ROBINSON, J.—The intervener seeks to recover of the plaintiff the amount of five promissory notes made by him, and the value of eighteen and one-half acres of plowing which it is alleged he agreed, but failed, to do. One of the notes is for two hundred and forty dollars, and was given as rent for land which the intervener leased to the plaintiff for the season of

1893. Another of the notes is for one hundred and ten dollars, another for two hundred and forty dollars, and another for ten dollars. These three notes were secured by a chattel mortgage on the interest of the plaintiff in the crops grown under the lease, and the first two were also secured by a mortgage on stock and other personal property. The fifth note was for thirty dollars, and was secured by a chattel mortgage on two hundred bushels of corn grown under the lease. The intervener demands judgment against the plaintiff for the amount of the claims mentioned, and asks that a landlord's lien be established against the corn grown under the lease, including that sold to the defendants, and that his three mortgages be foreclosed. In answer to the petition of intervention, the plaintiff pleads various defenses, which need not be set out at length. The jury found the sum of two hundred and eighteen dollars and thirty-one cents due to the intervener, that certain of the notes in suit were usurious, and that the school fund was entitled to recover of the plaintiff the sum of eighty dollars and thirty-six cents. Judgment was rendered accordingly. This is the second submission of this cause in this court. An opinion was filed on the first submission, a re-hearing was ordered, and the cause is again submitted for our consideration. Our examination of the case has been made unnecessarily difficult by the presentation in argument of a large number of trivial questions which only tended to obscure those which were controlling.

I. The appellee has asked to have the evidence stricken from the record on the ground that the official shorthand reporter's transcript of the shorthand notes was not duly authenticated. Amend-
1 ments to the abstract show a sufficient bill of exceptions properly filed, and that the translation of the shorthand notes was duly certified within

the time required for the filing of such translations in actions at law. The request to strike the evidence will, therefore, be denied.

II. After the issues were settled and before the jury was called, the intervener filed a motion to transfer the cause to the equity docket for trial. The motion was overruled. It was renewed after
2 the trial had been commenced, and was again overruled. We are of the opinion that these rulings were correct. The action was properly commenced at law, and the relief asked by the plaintiff was within the jurisdiction of a court of law. Only a part of the relief asked by the intervener was of an equitable character, and, had he been a defendant, he would not have been entitled to have the entire cause transferred to the equity docket. To have transferred a part of the issues to that docket would have caused delay in the trial, and an intervener has no right to a change in the proceedings which would cause delay.

III. The plaintiff and intervener had a conversation in the Castana Bank in regard to the amount the former was owing the latter, and several witnesses testified in regard to what was then said by the plaintiff. The court withdrew that conversation from the consideration of the jury, on the ground that it was in the nature of an offer to compromise. But
3 the intervener claims that it included admissions of facts made by the plaintiff which should have been considered by the jury, and the examination of the case which we have now made leads us to

merely an offer of compromise, and other statements made by the plaintiff were of the same character. But the intervener testified that the plaintiff said, in regard to paying the amount he owed: "I will give \$450 or \$460," without indicating that it was an offer of compromise; also, that "he told me that the four hundred and sixty or ninety dollars—something, whatever it was—was all that he owed me. He did not tell me he offered it to me to avoid suit." A bystander who heard the conversation, says the plaintiff stated that he had had his indebtedness computed, and found that he owed Ordway "four hundred and some dollars. He said he would make a tender of it, and that is all he could get, or all he owed him." The witness added: "I forget just the language." Other statements were made during the conversation which tended to show that the plaintiff was owing Ordway more than four hundred dollars. Some of the statements we have set out are in the nature of unqualified admissions of indebtedness to the amount of more than the sum last named, and were not mere offers to compromise. We conclude, therefore, that they were competent evidence for the intervener, and that the court erred in excluding them. *Bayliss v. Murray*, 69 Iowa, 292 (28 N. W. Rep. 604); 1 Greenleaf, Ev., section 192. The truth involved in the conflict between the testimony of the plaintiff, to the effect that his statements were merely offers to compromise, and that on the part of the intervener, that they were unqualified admissions of indebtedness to an amount stated, was for the jury to determine.

IV. The notes for one hundred and ten dollars and two hundred and forty dollars, secured by chattel mortgage, were given for borrowed money, and, as originally made, were usurious. On the back
4 of the note for two hundred and forty dollars is the following indorsement: "Received the interest in full, as payment for all usurious interest

on this and another note for \$110.00, and interest in full until Dec. 23, 1891, and extend time of payment till December 23, 1891. The above is in full payment for all usurious interest on this and another note. W. W. Ordway. J. W. Kassing." The intervener testifies, in harmony with the indorsement, that it was made, and credit given, to purge the two notes of all usury. We do not understand that the plaintiff denies signing the indorsement, nor that it was made for the purpose stated by the intervener. A usurious contract may be purged of usury by the parties to it, and, if the claims of the intervener in regard to the two notes last described are true, they are not now usurious. *Bank v. Eyre*, 52 Iowa, 117 (2 N. W. Rep. 995). That theory of the case should have been presented by the charge to the jury. The two

5 notes, by their terms, bore interest at the rate of ten per cent. per annum, and, if purged of usury, would bear that rate of interest until paid, for the reason that, when they were made, the law of this state permitted the making of contracts for that rate of interest, and the notes were not affected by the statute of the Twenty-third General Assembly, enacted in the year 1890, which made contracts for a rate of interest higher than eight per cent. usurious. The court instructed the jury in regard to the change in the statute respecting usury, but in such terms that the jury may have inferred that the notes made before the change, which provided for the payment of interest at the rate of ten per cent. before the change, would only bear interest at the rate of eight per cent. after the change took effect. To that extent, the charge was erroneous.

V. It is claimed by the intervener that there is no usury in either the thirty dollar or ten dollar note. Whether that is true depends upon the facts which the evidence establishes. The note first mentioned

was given for an agricultural implement known as a "lister," which was purchased for the plaintiff. The intervener claims, in effect, that he purchased it for twenty-five dollars, and sold it to the plaintiff for thirty dollars, taking the note in payment. If that was true, the note was not usurious; but, if the transaction on the part of the intervener was a mere loan of money to the plaintiff, it was usurious. The ten dollar note was given, for an extension of time on money due the intervener, and whether it was usurious depends upon the rate of interest which the debts extended bore; and that is a proper matter to be submitted to a jury.

VI. We have considered all the questions in the case which, in view of the conclusions reached, appear to be of sufficient importance to make their determination necessary on this appeal. Numerous other questions are referred to in argument, but they depend upon methods of trial and evidence given, and are not likely to arise on another trial. For the errors pointed out, the judgment of the district court is REVERSED.

THE INDEPENDENT DISTRICT OF OTTUMWA V. C. O. TAYLOR, *et al.*, Appellants.

Refund of School Tax: CERTIORARI. Under Code, section 822, providing that on *certiorari* the court may merely give judgment affirming or annulling the proceedings, or correcting the same, and directing further proceedings, *certiorari* would not furnish adequate relief to a school district against proceedings by the board of county supervisors in refunding a tax collected for the benefit of the school district, where the money had been actually refunded, and the tax payer had no money in the hands of the county officers. *Certiorari* lies only where there is no other plain, speedy, or adequate remedy, and, in this case, a suit in equity for the recovery of a trust fund is such remedy.

PARTY: Notice. It is not necessary to notify a school district of, or make it a party to an application to the county, made by one of the tax payers of the district to refund him school taxes paid,

5 which application is based on the claim that he legally belongs to another district having a lower rate of taxation.

Schools: TITLE TO TAXES. A school district which has for thirty

1 years furnished school privileges free of charge to people, living on designated land, and assessed and collected taxes during such time against such land, is entitled to the money paid for such
6 taxes where no other district has ever claimed any of the tax, or that the land was within its jurisdiction, although, through loss of records, there is no record of the organization of such district, or how such land came to be treated as a part thereof.

ESTOPPEL. The fact that one of the directors of a school district, and

8 the secretary of the school district board, and an elector who was not an officer of the district, while acting as judges of a school district election, refused to allow electors residing on certain land to
7 vote, on the ground that they lived outside of the district, will not estop the district from thereafter claiming that such land was within its limits, for purposes of taxation.

Appeal from Wapello District Court.—HON. ROBERT SLOAN, Judge.

FRIDAY, JANUARY 22, 1897

THIS action is against C. O. Taylor, the board of supervisors of Wapello county, and O. P. Bizer, F. J. Baum, and Norman Reno, members of said board. It is in equity, to recover from said Taylor one hundred and eight dollars and thirty-four cents, with interest, taxes paid by said Taylor to the county for the plaintiff, and alleged to have been illegally refunded and paid back to said Taylor. Decree was rendered in favor of the plaintiff against the defendant Taylor, for one hundred and twenty-two dollars and forty-two cents, with six per cent. on the judgment, and for costs. Defendant appeals.—*Affirmed.*

W S. Coen for appellants.

McElroy & Heindel for appellee.

GIVEN, J.—I. The facts of this case are undisputed, and those necessary to be noticed are as follows: The plaintiff has existed and operated as an independent school district, under the laws of Iowa, for forty years last past. The record of its organization has been lost. For over thirty years the northeast one-fourth of the northwest one-fourth, and the southwest one-fourth of the southeast one-fourth of section 14, township 72, range 14, Wapello county, have been treated by the plaintiff, the county, and the owners of said land as within the plaintiff district, and taxes for the use of said district have been annually levied and collected thereon, and paid to the district. During all those years plaintiff has afforded school facilities free of charge to persons residing on said land, and the same have been enjoyed by them. Taxes were levied and collected on said land for the use of the plaintiff for the years 1887 to 1891, inclusive, amounting to three hundred and ten dollars and fifteen cents. Said land is not within the corporate limits of the city of Ottumwa, but adjoining thereto. It has never been claimed by the adjoining district as part thereof. On the third day of April, 1893, the defendant Taylor, owner of said land, presented his petition to the defendant board of supervisors, claiming that said land should have been assessed as in district No. 2, district township of Center, instead of the plaintiff district, during said five years; that the taxes collected for said years were one hundred and eight dollars and thirty-four cents in excess of what were due to said district No. 2; and asked that that sum be refunded to him. On the fourth day of April, 1893, the defendant board sustained said petition, and ordered that the county treasurer refund to Taylor one hundred and eight dollars and thirty-four cents, "out of any funds in his hands,

or that might thereafter come into his hands, belonging to said independent district of Ottumwa." On April 22, 1893, the auditor issued his warrant on the county treasurer in favor of Taylor for said sum, and

the same was paid to him by the treasurer on
2 April 24, 1893. On the third day of April, 1893, the attorney for Mr. Taylor informed the secretary and members of the plaintiff's board that said petition was pending, and would be heard at ten 10 A. M. the next day; but plaintiff made no appearance or resistance to said petition. The defendant has not, at any time since said payment to him, had any money in the hands of the treasurer of Wapello county.

3 It also appears, that at the annual election in March, 1893, of directors for the plaintiff district, the secretary of plaintiff's board, and an elector who was not an officer of plaintiff, acted as judges of the election, and that they refused to allow electors residing on said land to vote, on the ground that they lived outside of the limits of the plaintiff district.

II. The first contention presented in argument is as to the remedy. Defendants contend that it can only be by *certiorari*, to correct the errors, if any, of the board of supervisors; and plaintiff contends

4 that that remedy is inadequate, and may not be invoked, because the remedy in equity is adequate to pursue this money as a trust fund. The remedy by *certiorari* would not have been adequate in this case. Section 3222 of the Code, provides that the court "may give judgment affirming or annulling the proceeding in whole or in part, or, in its discretion, correcting the same and prescribing the manner in

no money in the hands of the county. A judgment annulling the action refunding the money would have afforded plaintiff no adequate relief. "It is a general principle, belonging to *certiorari*, as to all other extraordinary remedies and proceedings, that process will not issue where it would be without beneficial results, and *certiorari* would not lie where no substantial relief can be given." 2 Spellman, Extr. Rel., section 1896. This money in the hands of the county treasurer was a trust fund held for the benefit of whoever was entitled thereto. *Barnes v. County*, 56 Iowa, 20 (8 N. W. Rep. 677); *Everly v. Supervisors*, 77 Iowa, 470 (42 N. W. Rep. 374). Being a trust fund, equity will aid the party entitled thereto in pursuing it into whatsoever hands it may have passed. Section 3216 of the Code provides that *certiorari* will only lie "when, in the judgment of a superior court, there is no other plain, speedy, and adequate remedy. There being a plain, speedy, and adequate remedy in equity to pursue this trust fund, *certiorari* is not the proper remedy.

Plaintiff lays some stress on the fact that it was not notified in writing of, nor made a party to, the petition of Mr. Taylor, for a refund. We are not cited to, nor do we know of, any law requiring
5 that plaintiff should be so notified, or made a party, and we see no reason why it should be so required.

III. We now inquire whether the plaintiff is entitled to this money. We have seen that, pursuing the course that all parties had acquiesced in the thirty years, this land was assessed and said money collected for and as taxes due to the plaintiff, and that district

No. 2 has never claimed any of the tax, nor that
6 the land was within its jurisdiction. We have also seen that during these thirty years, up to and including 1891, the plaintiff has furnished school privileges free of charge to the people living on said

land, and that they have availed themselves thereof. Counsel for defendant says: "I am not sure that the Taylor land belongs in the independent district." True, we have no record of the organization of the plaintiff district, nor when or how this land came to be treated as a part of it, but surely under the facts, the record being lost, we must assume that, at some time, it became a part of that district, in a manner authorized by law.

It is urged on behalf of the defendants that as the judges of the election in 1893 refused to allow electors then residing on said land to vote at that election, because not residents of the district, the plaintiff
7 is estopped from claiming that said land is within the district, and from claiming taxes levied thereon. To so hold would be carrying the doctrine of estoppel to an unwarranted extent. We are clearly of the opinion that the decree of the district court is correct.—**AFFIRMED.**

ELLEN M. CHAMBERS, Appellant, v. JOHN J. BRADY AND ROSE S. BRADY.

100	622
115	248
100	622
128	623
100	622
137	617

Undue Influence: PARENT AND CHILD: Evidence—Deeds. Inference of undue influence from the fact of an aged parent's conveying all his property to two children, with whom he lived, is overcome by evidence that he stated to a lawyer what he wanted, saying that he did not want to make a will, and did not need to make a provision for future support, as he could trust his children; that after executing the deed, he gave it to his daughter, and requested her to record it; that thereafter, to an assessor and others, he explained the matter and said that he wanted the grantees, who had been very good to him, to have the property for taking care of him; and that he objected to the marriage contracted by the child not provided for, and believed her husband to be a drunkard and a spendthrift.

Appeal from Johnson District Court.—Hon. M. J. WADE, Judge.

FRIDAY, JANUARY 22, 1897.

SUIT in equity to set aside and cancel a deed made by one Thomas Brady, in his lifetime, to the defendants. It is claimed that Brady was weak and unsound of mind at the time the conveyance was made, and that the defendants procured the execution and delivery thereof by fraud and undue influence. The court dismissed the plaintiff's petition, and she appeals.—*Affirmed.*

Joe A. Edwards and W. J. Baldwin for appellant.

Ranck & Bradley for appellees.

DEEMER, J.—Thomas Brady was the owner of one hundred and sixty acres of land in Johnson county, valued at about the sum of six thousand dollars. He, with his family, had resided thereon, at the time of his death, more than forty years. His wife died in the year 1874, and his three children, who are the parties to this litigation, remained with him until the marriage of plaintiff, in the year 1881. After the plaintiff's marriage, she left the old homestead, and took up her residence with her husband. The defendants continued to live with their father upon the premises in controversy until his death, which occurred in July of the year 1894. On the fifteenth day of July, 1893, he executed the deed which is sought to be avoided in this case, and at his suggestion the deed was recorded on the same day. Brady was eighty-three years old at the time he died. He had seen service in the Mexican war, was a man of good habits, and for a man of his age was physically strong when he died.

The appellant claims that, at the time the deed was executed, Brady was suffering from senile dementia, and that, while he might not have been a fit subject for the insane commissioners to take in charge, yet he was so weak of intelligence that the conveyance made by him should be avoided. Appellant also claims that the deed was procured through fraud and undue influence practiced by the appellees upon their father. These claims are denied by the appellees.

The first question to which we will give attention is that relating to the alleged unsoundness of mind of the grantor. It is practically undisputed that the deceased was a well preserved man, physically, for one of his age, and it is conclusively shown that he was a man of strong convictions and of great firmness of character. He lived, it is true, beyond the period usually allotted to man, and was somewhat childish during the latter years of his life, and, it may be, was suffering from senile dementia at the time he died. But a careful examination of the evidence leads us to the conclusion that at the time he made the deed in question he had sufficient mental capacity to comprehend the nature and quality of his act, and to proceed with judgment and discretion in disposing of his property. It would be a useless task to set forth all, or even a considerable part of the evidence from which we reach our conclusions. It is sufficient to say that we think the plaintiff has failed on this issue, and that the great preponderance of the evidence is in appellees' favor. Appellant relies quite largely upon the opinions of experts, based upon hypothetical questions propounded to them. These questions embodied all the peculiarities and idiosyncrasies of

of mental strength. It is questionable whether anyone could meet the requirements of such a test. But, however this may be, the testimony, from those who knew him best, who watched his daily life and marked his conduct, is almost wholly to the effect that he was sound of mind up to the very day on which he died.

II. Appellant further claims that, if it be conceded that the conveyance cannot be avoided because of unsoundness of mind, it should nevertheless be set aside because of fraud and undue influence on the part of the grantees. As preliminary to this contention, they insist that undue influence will be inferred from the nature of the transaction alone, where, as in this case, the instrument was executed between persons standing in such confidential relations as parent and child, and, that the burden is upon the grantees to show that the conveyance was freely and deliberately made. It is doubtless true that, under the facts disclosed, the rule contended for should obtain; and we look then to see whether the defendants have met the burden imposed upon them. When Brady concluded to make the deed, he went to the office of an attorney at Iowa City, stated what he wished to do, and asked the attorney to prepare the deed. When inquired of as to his object, he stated that he wished to give the defendants his property, and did not desire to make a will, but wanted them to have a home after he was gone. To a suggestion from the attorney that a condition for future support might properly be included, he said that he thought he knew what he was doing, and that he did not want that in the deed. He said he could trust his children without any such provision. After the instrument was prepared, a notary was called, and the grantor's acknowledgment taken. After the deed was signed and acknowledged, Brady delivered the deed to his daughter Rose, and requested

her to take it to the court house for record. This she did, and from that date on, Brady declared to various persons that the property belonged to the appellees. To an assessor who came to assess the property in the year 1894, he explained the whole transaction, and gave as his reasons for making the deed, that John and Rose had been very good to him, and he wanted them to have the property for taking care of him. The defendants themselves could not, because of their relationship to the deceased, give in evidence any personal transactions or communications had with him, and no direct evidence was adduced by the plaintiff tending to show any undue influence used by the defendants in securing the deed. She claims, however, that the division was so unfair, and the relations of the parties so close, that fraud should be inferred. To meet this it is shown that the deceased objected to plaintiff's marriage to Chambers; that he did not like him; that he believed him to be a spendthrift and a drunkard. Again, it is shown that the deceased lived with the appellees after the marriage of appellant, and that they took care of him in sickness and in health, and that he recognized their services as valuable to him. This in large measure accounts for the conveyance, and, as far as possible, under the circumstances, rebuts the suggestion of undue influence. Moreover, it is quite well established that the deceased was a man of firm conviction. He met every suggestion which did not accord with his views with decided opposition, and so far as possible. "had his own way." There is an absolute want of

in this case, it would be virtually a declaration that no conveyance from father to child, where other children are not remembered, could be sustained after the death of the grantor. This we are not inclined to do. The law places no limitations upon the power of the father to make such disposition of his real estate during his life-time as he may elect, even though other children are thereby deprived of property which otherwise would have descended in part to them upon his death. The facts in this case tending to show undue influence are not stronger, if as strong, as in *Brockway v. Harrington*, 82 Iowa, 23 (47 N. W. Rep. 1013), and *Lewis v. Arbuckle*, 85 Iowa, 335 (52 N. W. Rep. 237), wherein we sustained conveyances against claims of unsoundness of mind and undue influence; and, following these, we think the judgment should be **AFFIRMED.**

WILLIAM COMFORT V. W. M. YOUNG, Appellant.

Libel: **PRIVILEGE:** *Information filed.* An information filed with the board of insane commissioners, charging a specified person with being a fit subject for custody and treatment in the insane hospital, is not privileged, unless the informant acted in good faith, upon probable cause and without malice.

Appeal from Buchanan District Court.—HON. A. S. BLAIR, Judge.

FRIDAY, JANUARY 22, 1897.

ACTION at law to recover damages for an alleged libel, published by defendant of and concerning the plaintiff. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

H. H. Bezold for appellant.

Woodward & Cook for appellee.

100	627
1108	476
100	627
110	515

DEEMER, J.—The alleged libelous publication consists of an information, filed by defendant and one G. W. Dickinson, with the board of insane commissioners of Buchanan county, charging that plaintiff was, and is, insane, and a fit subject for custody and treatment in the insane hospital of the state. On this information plaintiff was examined by the physician who was a member of the board, pronounced perfectly sane, and finally discharged, without further action. Plaintiff thereupon commenced this action, alleging that the information was filed and published maliciously, and without probable cause, for the purpose of injuring the plaintiff, to deprive him of his credit and reputation, and to cause it to be suspected and believed that he was insane. The defendant pleaded that he had good reason to believe that plaintiff was insane, and that he filed the information for the good of plaintiff and the public generally, and that the communication was privileged. The exact claim made by defendant in his answer is that, prior to the ninth day of July, 1894, said William Comfort had stated that he (said Comfort) had had a revelation from God to close the creamery at Jesup on Sunday, and to have one Stodard turned out of church for sending milk to said creamery on Sunday, and other sayings of said Comfort in relation to having had revelations from God; and, having heard others say that they believed that said Comfort's mind was affected, this defendant, with one G. W. Dickinson, did, on the ninth day of July, 1894, appear before the clerk of said board of commissioners of insanity, who is also clerk of the district court, filed the information required by stat-

proceeded to trial before a jury, resulting in a verdict and judgment for plaintiff for seven hundred and fifty dollars.

Although appellant has assigned twenty-five errors, he argues none but the one that "the undisputed evidence shows that the information upon which the libel is formed is, and was, a privileged communication." The law in such cases as this is well understood. Persons have the undisputed right to file such informations as the one referred to, when made in good faith, and in the honest belief that the statements therein made are true. But one cannot use such instrumentalities for the express purpose of gratifying his malice or indulging his passions, without making himself answerable to the law. *Mayo v. Sample*, 18 Iowa, 306; *Rainbow v. Benson*, 71 Iowa, 301 (32 N. W. Rep. 352); *Tillinghast v. McLeod* (R. I.) 21 Atl. Rep. 345; *White v. Nichols*, 3 Howard, 266; *Gassett v. Gilbert*, 6 Gray, 94.

The court below gave the jury the following instruction, with reference to the question of privilege: "(11) The real question for you to determine first in this case is: Was the information made by the defendant and filed by him honestly and in good faith, upon probable cause, he believing at the time that the plaintiff was insane, or laboring under an insane delusion, and done for a laudable purpose, to protect himself, his property, or society? And if you find, from the preponderance of the credible evidence in the case, that it was so done, then your verdict should be for the defendant. (12) But if you find that the same was made and filed without probable cause, or without honestly believing that the statements therein were true, but was done to injure the plaintiff in his good name and reputation, or for some advantage over him, then the law would

imply malice, and you should find for the plaintiff." Appellant makes no complaint, in argument, of these instructions, and we consequently treat them as stating correct propositions of law.

His main contention is that the publication was privileged. We have gone over the evidence with care, and conclude that the jury may well have found that defendant was actuated by express malice in instituting the proceedings complained of. It appears that plaintiff complained of the operation of a creamery at the town of Jesup on Sunday, and that he caused the arrest of the corporation operating the same for violation of the Sunday law. Defendant was interested in the creamery, and was much provoked on account of these criminal proceedings; and the jury may well have found that he filed the information with the board of insane commissioners for the purpose of bringing plaintiff, who was the prosecuting witness in the criminal proceedings, into disrepute and ridicule, to the end that the criminal proceedings might be abated, or for the purpose of retaliating upon the plaintiff. The jury was perfectly justified in finding, from the evidence, that the defendant would never have made the complaint he did, if it had not been for the criminal prosecution instituted by the plaintiff. It is not our custom to set out the evidence from which we draw our conclusions, and there is nothing in this case which seems to require more than a statement of ultimate conclusions. It was for the court to deter-

The case having been properly submitted, and there being sufficient evidence to justify the verdict, the judgment is **AFFIRMED**.

CLAYTON COUNTY V. JUSTUS HERWIG AND KATE HERWIG, Appellants.

100 631/
128 53

Equity Jurisdiction: JOINDER OF CAUSES. In a suit by a county to correct a description in a deed of land conveyed to it for a road, injunction against obstruction of the highway may be also sought and had, though there be a remedy at law therefor, by abatement of nuisance, or though defendant be punishable criminally for the obstruction.

Appeal from Clayton District Court.—HON. A. N. HOBSON, Judge.

FRIDAY, JANUARY 22, 1897.

THIS is an action in equity to reform a deed by correcting a description so that it will express the real intent of the parties to the conveyance. In 1877, the county purchased of Phoebe and Ellen Gordon, the then owners of the land, a piece of ground for a public highway. A mistake was made in describing the land purchased. The land in fact purchased, was fenced out by the grantors, and set apart for highway purposes. It has ever since been used by the public as a highway, and recognized as a public highway by the proper authorities. In 1895 the Gordons sold their land, from which this purchase by the county was made, to the defendant, Kate Herwig. Defendant, when she made the purchase, knew what land belonged to the county. The defendants removed the fence on the line of the highway, and obstructed and impeded travel thereon, by placing posts and wire on and across the same, and by plowing it up. The petition prays for a reformation of the deed, and asks that the

defendants be enjoined from interfering with the free use of said highway, and that they be required to remove all fences and obstructions placed by them thereon. The defendants moved to strike certain allegations from the petition,—the allegations that the Gordons had fenced out and set apart to the county and the public said strip of land; also, all that part of the prayer which asks an injunction and the removal of obstructions. The grounds of the motion, in brief, are that the allegations set out a cause of action for which there is a plain, speedy and adequate remedy at law; that the facts pleaded are irrelevant, and a statement of evidence only; that the portion of the prayer sought to be stricken asks for relief to which plaintiff is not entitled in this action. The court overruled the motion, and the defendants excepted and appeal.—*Affirmed.*

Davidson & Cook for appellants.

J. E. Corlett for appellee

KINNE, C. J.—Appellants' contention is that the allegations sought to be stricken out, when taken in connection with other parts of the petition, show facts constituting a nuisance, for which a remedy is afforded by sections 4092 and 4093 of the Code, and that the action is improperly joined with an action in equity to reform the deed. In other words, they claim that the remedy of an injunction to restrain the obstruction of a highway cannot be had in an equitable action to correct the conveyance, because the acts sought to be enjoined may constitute a nuisance within the provisions of the criminal law. This court

Iowa, 546 (17 N. W. Rep. 888); *Moore v. Railway Co.*, 75 Iowa, 266 (39 N. W. Rep. 390); *Gribben v. Hansen*, 69 Iowa, 256 (28 N. W. Rep. 584); *Ewell v. Greenwood*, 26 Iowa, 379; *Holmes v. Calhoun County*, 97 Iowa, 360 (66 N. W. Rep. 146), and cases cited; *Shirely v. Railroad Co.*, 74 Iowa, 169 (37 N. W. Rep. 133). It was held in *Bushnell's Case*, that this equitable remedy had been, by Code, section 2508, preserved, and that thereby the legal remedy might be made more effectual. No reason appears why the same rule will not apply to a case like that at bar. If it should be conceded that the defendants might be punished for the crime of obstructing the highway, it is no reason why, in such a suit as this, they may not be enjoined, if it is found that they had committed the acts complained of, and thereby prevented from a constant repetition of them. Furthermore, a court of equity having jurisdiction for the purpose of correcting the deed, the relief sought by injunction is incidental thereto; and it is the policy of such courts, when jurisdiction is once obtained, to retain it until the controversy is settled. As is said in *Insurance Co. v. McCrea*, 4 G. Greene, 230, "it is within the peculiar province of that court [equity] to correct mistakes, and relieve against errors of this kind; and, having got jurisdiction for that purpose, they have power to go on and complete the remedy, even though, by so doing they decide upon matters purely pertaining to courts of law." *McDowell v. Lloyd*, 22 Iowa, 450; *Stapleton v. King*, 40 Iowa, 284. The cases cited by appellants are not applicable. The ruling of the court was correct, and in harmony with the holdings of this court.—

ELIZABETH CHRISTMAN, *et al.*, Appellants, v. J. R.
PEARSON.

Handwriting Expert. A person whose business for fifteen years required him frequently to make comparisons of handwritings,
1 is competent to testify as an expert in regard thereto, though he testifies that he is not an expert, in the sense of making it his business.

Books of Account: PAROL VARIANCE. Books of account are not the
2 best evidence, so as to render inadmissible oral testimony as to payments credited therein, and their application.

Appeal from Linn District Court.—HON. WILLIAM G.
THOMPSON, Judge.

FRIDAY, JANUARY 22, 1897.

THE plaintiffs are executors of the estate of John Christman, deceased, and bring suit on four notes. The defense was payment of three of the notes, and denial of the execution of the other. Trial to jury. Verdict and judgment for part of the amount claimed. Plaintiffs appeal.—*Reversed.*

Giffen & Voris for appellants.

Richard A. Stuart for appellee.

LADD, J.—The defendant, in his answer, denied the execution of one of the notes sued on. E. H. Crocker, being called as a witness, testified that he was an attorney at law, and had been for seven
1 or eight years; that for fifteen years past his business had required him to examine handwritings a great deal, and of a great many differ-

handwritings, to find out whether the handwriting was that of a certain person. In answer to the question whether he was an expert in judging handwriting, he said that he was not, in the sense of making it his business. He was then asked to state whether, in his opinion, the same person wrote the signature denied and those to the other notes, the execution of which was admitted. The objection that he had not shown himself competent to testify was sustained. This ruling was erroneous. It is not necessary that a witness, in order to give his opinion on comparisons of handwritings, should claim to be an expert, or that he possess the highest skill in detecting the differences or similarities in the strokes or curves of the pen. Persons in many different occupations are required to pass upon the genuineness of signatures, and, certainly, to do so frequently for a period of fifteen years by a man of intelligence would somewhat qualify him to give an opinion in making comparisons. The value of the opinion would, of course, be left to the jury. *Hyde v. Woolfolk*, 1 Iowa, 159.

II. L. B. Christman, while on the stand as a witness, testified that certain payments for which receipts were given, were paid on account, and that they balanced account. On cross-examination it appeared that the day-book contained the items referred to, and upon motion of the defendant his testimony was stricken out, on the ground that the day-book was the best evidence. Thereafter the witness was asked whether the payments were applied on the notes or on the accounts, and, on the same ground, his answer was excluded. We gather, from the abstract and arguments, that the thought of the court was that, the items having been entered in the day-book, such book would be the best evidence, and the witness could not testify from his own recollection. The introduction

of the books of account in evidence is carefully guarded by the statute. They are received as proof from necessity, and because the ordinary means of establishing numerous items, are often wanting. Their value as evidence must depend largely upon their condition, and the manner in which they were kept, and

the character of the evidence laying the foundation for their introduction. Oral evidence

may be introduced concerning the same transactions referred to in the books of account, and its value, as compared with that of such books, must, of course, depend upon circumstances. It was important for the plaintiffs to show, if they could, not only that the payments were not made on the notes, but to explain where they were in fact applied; and they should have been permitted to do so by oral testimony, even though the books of account may have been admissible for the same purpose.—REVERSED.

THE CITIZENS STATE BANK, Appellant, v. ROWLEY & DRIGGS, *et al.*

Harmless Error: EVIDENCE: Instructions. Error, if any, in admitting evidence of the arrest of a certain person, cannot be held prejudicial on the ground that the jury were thereby led to suppose
 1 that the loss of his time was an element of damages recoverable in the case, where no evidence of the value of his time is offered, and no reference is made thereto in the instruction stating what can be allowed as damages.

SAME: Verdict—appeal. A statement by the court of issues leading

PLAINTIFF brings suit upon a check for one hundred dollars, which was drawn by the defendants, Rowley & Driggs, upon the defendant, the Iowa Savings Bank, and delivered to one Ball, who procured the same to be cashed at plaintiff's bank. It is alleged that the defendant, the savings bank, refused payment, though at the time having in its possession money of the drawers sufficient to pay the same. Rowley & Driggs answered, admitting the execution of the check, and its payment by plaintiff to Ball, and that demand had been made for the payment of the same, and payment refused. By way of counter-claim they aver that the check was given to Ball, who was then acting as their agent, and it was to be used in the purchase of certain cattle; that Ball presented it to plaintiff, and received the money therefor,—ninety-one dollars and fifty cents of which he paid to one Bellmeyer, on account of the purchase of certain cattle; that before said money was paid to Bellmeyer, he agreed with Ball to furnish him sufficient money to complete the purchase of said cattle upon a sight draft drawn by Ball upon the defendants, Rowley & Driggs; that after Ball had paid the ninety-one dollars and fifty cents to Bellmeyer, plaintiff refused to furnish the money, and by reason thereof Ball was unable to complete the purchase of the cattle; that Rowley & Driggs have not been repaid the ninety-one dollars and fifty cents, and were at an expense of twenty dollars in attempting to purchase the cattle, and that they lost fifty dollars in profits on the cattle. Judgment is asked for one hundred and seventy dollars. The defendant, the Iowa Savings Bank, answered, denying that at the time said check was presented, it had funds on hand for its payment, and alleging that prior thereto payment of said check had been stopped by order of the defendants,

Rowley & Driggs. They also averred that the check had not been assigned to plaintiff for value, but plaintiff wrongfully obtained the same in payment of an indebtedness of the payee to plaintiff, knowing that said payee had no right to so apply the same. Plaintiff replied by a denial of the allegations in the counter-claim of Rowley & Driggs. The cause was tried to the court and a jury, and a verdict of eleven dollars and fifty cents returned against the plaintiff, upon which a judgment was entered. Plaintiff appeals.—*Affirmed.*

A. D. Keller and Lynn & Foley for appellant.

Lewis & Beardsley for appellees.

KINNE, C. J.—I. It is insisted that the court erred in permitting the witness Ball to testify that he was arrested at the instance of Gilmore the cashier of plaintiff bank, on the charge of disposing of mortgaged property. It is said that the jury were thereby

led to believe that the loss of time by Ball was
1 an element of damages recoverable in the case.

If the admission of the evidence was error, it was clearly without prejudice. Nothing was said as to such damages. No evidence was offered as to the value of Ball's time, and the court instructed the jury that they could allow as damages, in case they found for the defendants, "the amount of the money so paid to Bellmeyer, which has not been returned to them, if any, and the amount of money expended in efforts to purchase the Bellmeyer cattle." In view of this instruction, the jury could not have been misled into allowing damages for Ball's loss of time.

II. Complaint is made as to the court's statement of the issues to the jury. If, as is claimed, the jury were thereby led into an error in returning a

verdict in favor of both defendants, when it should have been in favor of Rowley & Driggs only, it did not prejudice the plaintiff. Besides, the jury was told that the damages were on the counter-claim of Rowley & Driggs. The error, if such it was, in the verdict might have been corrected on application of plaintiff in the lower court.

III. It is urged that there was no evidence to support the counter-claim. We think the evidence was ample to justify the jury in finding that all money was furnished by Rowley & Driggs, and that it belonged to them until the cattle were sold. There was evidence from which the jury might properly find that Ball had an arrangement with plaintiff, before he paid the ninety-one dollars and fifty cents to Bellmeyer, by which plaintiff was to advance such further sums upon the sight draft as might be needed to complete the payment of the purchase price of the cattle. We shall not consider the evidence in detail. If there was no such arrangement made in the morning as testified to by Ball, there was no occasion for plaintiff bank telegraphing the same forenoon, as it did, to ascertain if such draft would be honored.

IV. Very many questions are argued by counsel for appellant, which we do not deem it necessary to discuss. We have examined all of the alleged errors, and conclude that no reason exists for disturbing the judgment. It is claimed that the verdict is not sustained by the evidence. Upon many points the evidence was in conflict, and, as there was evidence which justified the verdict, we cannot disturb it. This whole record impresses us with the conviction that plaintiff was attempting to force Ball to pay an old debt of his out of money which did not belong to him, and because he refused so to do, the plaintiff

taken from Ball pay for the exchange on the draft it was to cash. We discover no reversible error.—
AFFIRMED.

THE J. V. FARWELL COMPANY V. S. S. ZENOR, Sheriff.
Appellant.

Appeal: REVIEW: Denial in abstract. The undenied averment in appellee's abstract, that all of the evidence is not before the court in the several abstracts, will be accepted as correct by the supreme court, and will prevent a consideration of any question depending upon the evidence. Therefore, refusals to strike evidence, sustaining objections to cross interrogatories, and an assignment that the verdict is excessive, cannot be reviewed in that condition of the record.

ON RE-HEARING. — SATURDAY, JANUARY 28, 1897.

Replevin: FRAUDULENT CONVEYANCE: Irrelevant evidence. In 1 replevin by a mortgagee against a sheriff, who admitted taking certain goods in attachment against the mortgagor, but denied any knowledge of plaintiff's rights, evidence that the mortgage was voluntary, and void as to the mortgagor's creditors, was not admissible, under the issues tendered.

Consolidation: PRESUMPTION. Appeal. It will be presumed, on 2 appeal, that judgment in but one case was rendered below, and this is so, though it is stated in the abstract that two cases were consolidated in the district court, where the only reference to a second case is found in the statement of one witness, who says that he bought goods of the plaintiff in the second suit and gave a note for it, which remains unpaid, and, in the caption of the record, which recites the title of both cases, in stating a submission to the jury.

Appeal from Dallas District Court.—**HON. J. H. APPLE-
GATE, Judge.**

FRIDAY, DECEMBER 13, 1895.

A. U. Quint, D. W. Woodin, and F. M. Powers for appellant.

Cardell & Giddings and *Edmund Nichols* for appellee.

KINNE, J.—I. Plaintiffs in this action seek to recover the possession of certain goods, or their value, which goods they claim under two certain chattel mortgages executed by one Jonas Nichols. The answer is a general denial. After plaintiffs had taken possession of the goods by virtue of their mortgages, the defendant, as sheriff, took the same from them by virtue of a writ of attachment which had been issued in the suit of one Minchen against Jonas Nichols. Appellant claims that the verdict is contrary to the evidence, in that the evidence failed to show that the goods taken by plaintiffs under the mortgages are the identical goods described therein. This question, of course, can only be determined from the evidence. This record consists of an abstract of appellant, and two amendments thereto, and an amended abstract filed by the appellees. In the second amendment filed by appellant is this statement: "The abstract now made in this case being the appellant's abstract of record, the appellant's former amendment, and this amendment do set out a full and fair statement of all the pleadings, evidence, and rulings of the above-entitled cause." This is the only reference in any of appellant's abstracts, relating to this matter. Appellees have filed an additional abstract, wherein they deny the correctness of appellant's abstracts and amendments, and aver that all of the evidence is not before this court in the several abstracts. Appellant having made no denial of this claim, we must accept the statement in appellees' abstract as correct. *Marsh v. Smith*, 73 Iowa, 296 (31 N. W. Rep. 866); *Acton v.*

Coffman, 74 Iowa, 17 (36 N. W. Rep. 774); *Foley v. Hefferon*, 70 Iowa, 572 (31 N. W. Rep. 877). Under this condition of the record, we cannot consider any question raised, the determination of which requires a consideration of the evidence. *Gilbert v. Miller*, 82 Iowa, 728 (47 N. W. Rep. 1016); *Chapin v. Garretson*, 85 Iowa, 377 (32 N. W. Rep. 104); *Johnson v. Johnson*, 87 Iowa, 410 (54 N. W. Rep. 250); *Wicke v. Insurance Co.*, 90 Iowa, 4 (57 N. W. Rep. 632). We are, therefore, owing to the condition of the record, precluded from determining whether the verdict is contrary to the evidence.

II. Appellant also alleges error in the overruling of his motion to strike out certain evidence. For the reason heretofore given, we cannot pass upon this assignment. Not having all of the evidence before us, we cannot say whether or not the ruling was correct.

III. It is said that there was error in sustaining certain objections to the cross-interrogatories propounded to certain witnesses. This alleged error cannot be considered, for the reasons heretofore given. We may say, however, that the questions asked were not proper on cross-examination. No such matter was inquired about on the examination in chief. No fraud was pleaded. The only issue presented was the identity of the goods. This evidence seems to have been desired to show that the mortgages were voluntarily given. The pleadings presented no such issue, and for that reason alone the rulings were proper.

IV. Lastly, it is urged that the verdict is excessive. This claim cannot be considered, in the absence of the evidence. Furthermore, there is no evidence

SUPPLEMENTAL OPINION ON RE-HEARING.

Appeal from Dallas District Court.—HON. J. H. APPLE-
GATE, Judge.

SATURDAY, JANUARY 23, 1897.

ACTION to recover possession of certain merchandise, or its value, of which plaintiff alleges it is the owner. Plaintiff alleges that the said merchandise was wrongfully taken and wrongfully detained by defendant, as sheriff, under a writ of attachment in favor of W. T. Minchen against Jonas Nichols. Defendant answered, denying every allegation in said petition "except as hereinafter expressly admitted." He admits that he is sheriff, and that he holds certain merchandise by virtue of an attachment in favor of W. T. Minchen against Jonas Nichols, and says as follows: "But of any claims of this plaintiff to such goods and merchandise the defendant has no knowledge, or information sufficient to form a belief." The jury found for the plaintiff, and found the value of its interest to be three hundred and fifty-seven dollars and sixty-five cents. Defendant's motion for a new trial was overruled, and judgment entered on the verdict. Defendant appeals.—*Affirmed.*

D. W. Wooden, A. U. Quint, and F. M. Powers for appellant.

Cardell & Giddings and *Edmund Nichols* for appellee.

GIVEN, J.—I. A re-hearing was granted in this case for the reason that the former opinion was based upon a misapprehension as to the true state of the record. Happily, it does not often occur that we are

called upon to consider a case presented with so little regard to the rules of practice as this is; but, notwithstanding the unsatisfactory condition of the record, we will consider the questions presented. The merchandise in question is clothing and furnishing goods contained in boxes. Plaintiff acquired the goods claimed by it under a chattel mortgage from Jonas Nichols, against whom the attachment was issued. A large lot of clothing and furnishing goods, contained in boxes, was taken, under the attachment, as the property of Jonas Nichols, and the controlling issue is whether that claimed by plaintiff was included in that taken by the defendant. Jonas Nichols was examined on behalf of the plaintiff, and on cross-examination defendant put a number of questions, to which plaintiff's objections were sustained. The

1 objections were properly sustained, for the reason that it was not a proper cross-examination, and the matters inquired about were immaterial to the issues joined. Defendant sought to show by this cross-examination that the mortgage to plaintiff was voluntary, and void as to creditors of Jonas Nichols. No such issue was tendered. Exceptions were taken to other rulings on the evidence, but we find no error therein prejudicial to the defendant.

II. Appellant's next contention is that the evidence does not sustain the finding that the goods claimed were taken by him under the attachment. The instructions are not before us, but it is not questioned that this issue was properly submitted to the jury. We have examined the evidence with care, and, though conflicting in some particulars, we think it sufficiently supports the verdict, both as to the identity of the goods and their value. It is unnecessary that we set out the evidence.

III. It is said in the original abstract that the case of the *Volger-Gendtner Trunk Company* was

consolidated with this, that said company was substituted as plaintiff, and that its petition was the
2 same as this, except that the mortgage was upon different goods, and that the amount claimed was seventy-one dollars and forty-four cents. In appellant's first amendment to his abstract, it is stated that the answer in that company's case was the same as this. The only reference to that case in the evidence is where Jonas Nichols says that he bought goods of that firm, gave a note and mortgage therefor, which have not been paid, and that he turned over the goods, and they were taken to a certain building. The only other reference to it in the record is in the caption of the record showing the submission to the jury, the title of both cases being stated. Appellant contends that, as the judgment was not divided so as to show what part is for plaintiff and what for said company, the verdict and judgment should be set aside. Our view of this record is that it must be construed as showing that only the case of *J. V. Farwell Co. v. S. S. Zenor, Sheriff*, was tried. The other case seems to have been lost sight of on the trial, and certainly has been on this appeal. Our conclusion is that the judgment of the district court should be **AFFIRMED**.

ALMIRA HARTNEY V. H. S. JORDAN, *et al.*, Appellants.

Fraudulent Conveyance: EVIDENCE. A finding that a chattel mortgage was fraudulent as to a prior unrecorded mortgage, is sustained by evidence that the mortgagor, in executing the second mortgage, intended to defeat the prior one, and that much of the consideration for such second mortgage had no foundation in fact, and the testimony of the second mortgagee is full of contradictions.

Judgment: FRAUDULENT CONVEYANCE: Default. A judgment should be rendered against a chattel mortgagor, on a cross-petition by a second mortgagee in an action to foreclose the prior mortgage, where the mortgagor makes no defense, although the second mortgage is found to have been executed with the intent to defeat the mortgagor's creditors.

Appeal from Crawford District Court.—HON. G. W. PAINE, Judge.

SATURDAY, JANUARY 23, 1897.

ACTION for foreclosure of chattel mortgage. Defendant Jordan, in a cross-petition, asks that his chattel mortgage be declared superior. Decree for plaintiff, and defendant appeals.—*Modified and affirmed.*

J. P. Conner for appellants.

Shaw & Kuehnle for appellee.

LADD, J.—The defendant Howard, on June 28, 1893, executed to one Howell a chattel mortgage to secure the purchase price of three hundred dollars, covering a team, harness, and "bus," and this mortgage was afterwards assigned to plaintiff. It was never recorded. Howard also executed to Jordan a chattel mortgage covering the same property, to secure the payment of two hundred and seventy-five dollars,

December 8, the same year. The defendant Laub had a claim for keeping the horses, which is not in dispute. Unless it appeared on the trial that the mortgage of Jordan was fraudulent, or that Jordan, before he took the same, had notice of the plaintiff's mortgage, the mortgage of Jordan would be entitled to priority. The evidence fully discloses that Howard, in executing the mortgage to Jordan, intended to defeat the mortgage of plaintiff. Much of the consideration of Jordan's mortgage appears to be trumped up, and his whole story is full of contradictions. His testimony, in connection with the surrounding circumstances, warrants the conclusion that the mortgage was not taken in good faith. In entering the decree, however, the district court dismissed Jordan's cross-petition entirely. Judgment should have been rendered against Howard thereon, as he made no defense. With this modification, the decree should be affirmed.

—MODIFIED AND AFFIRMED.

C. F. KREUGER V. C. A. SYLVESTER, Appellant.

Evidence: IMPEACHMENT. A witness cannot be impeached by proving contradictory statements made out of court, where no foundation has been laid therefor.

MORTALITY TABLES. A mortality table, shown to be a standard table used by leading life insurance companies, is admissible in evidence. Whether such showing is essential, is not decided.

SHORTHAND REPORT IN CRIMINAL CASE: *Admissibility in subsequent civil suit* In a civil action for assault and battery, it was not error to admit the evidence of a witness taken in shorthand on the trial of defendant for assault to commit great bodily injury on plaintiff, involving the same assault, in which said witness was fully cross-examined, where the proper foundation was laid, and the reporter who took the notes testified at the civil trial as to what the witness said in the criminal trial.

Amendment in Trial. An answer stated that plaintiff had transferred his cause of action to his attorneys, and was not the real party in interest. The reply denied any assignment except as

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100	647
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security for attorney's fees, and averred that such assignment was after action brought. *Held*, that an amended reply filed at the trial, containing only a denial, did not present a new issue.

DISCRETION. Even if the last reply presented a new issue, the trial court did not abuse its discretion in allowing it to remain on file.

ASSIGNMENT OF ACTION: *Abatement.* An assignment by plaintiff of his cause of action to his attorneys as security for their fees, after the commencement of the action, will not prevent the action from continuing in the name of the original plaintiff.

HARMLESS ERROR. If this ruling was erroneous, it was harmless, since the assignment was not absolute, but merely a contract for contingent fees.

EXEMPLARY DAMAGES. A petition in an action for assault and battery may be amended so as to ask for exemplary damages on facts set forth in the original petition.

Remarks of Judge. A statement by the court, in an action for assault and battery, in reply to a statement by defendant's attorney that a mechanic might resist to any extent before allowing an article left with him for repair to be taken before payment for such repairs, that a person could not go to the extent of killing a man to protect a small claim, is not prejudicial to defendant.

Appeal: ABSTRACTS. The evidence cannot be considered on appeal where appellant's abstract does not state that it contains all the evidence and there is no statement or certificate from the attorneys that it embraces any or all of the record on which the case was tried, though appellee files an amended abstract supplying some parts of the record, which denies that the two abstracts, together, contain all the evidence on any particular point.

INSTRUCTION. Alleged error in instructions will not be considered on appeal, where the record does not contain all the instructions, and those given announce correct abstract propositions of law.

Appeal from Floyd District Court.—HON. P. W. BURR, Judge.

SATURDAY, JANUARY 23, 1897.

Boulton & Brown for appellant.

H. F. Fitzgerald and *J. S. Root* for appellee.

DEEMER, J.—The appellant's abstract does not state that it contains all the evidence introduced upon the trial, nor is there a statement, or certificate, from the attorneys that it embraces any, or all, of the record upon which the case was tried and determined in the court below. Appellee has filed an amended abstract, supplying some parts of the record; but, in this, he denies the correctness of many of the pleadings and exhibits set forth in appellant's abstract; denies that the abstract contains all the instructions, and asserts that the instructions were not excepted to; denies that the two abstracts contain all the evidence, or all the evidence on any particular point; denies that the evidence was properly made of record, by bill of exceptions, or otherwise. The only reply to these denials is found in appellant's argument. In this he "admits" that he has set out only sufficient of the record to show fairly that part of it which he claims is error; and he further sets out a skeleton bill of exceptions, signed by the judge of the district court, which seems to have been filed within the time allowed by law.

The condition of the record is such that we cannot examine any question involving a consideration of the evidence. Turning now to those matters which we may review, we find the first error assigned relates to rulings on the pleadings. The defendant filed a supplemental answer, in which he stated that the plaintiff had sold and transferred his cause of action to his attorneys, and that he was not the real party in interest. To this supplemental answer, plaintiff filed a reply, denying that any assignment of the cause of action was ever made to his

attorneys except as security for their fees, and avers that this assignment was made after the action had been commenced. While the trial was in progress, the plaintiff submitted a reply, denying the allegations of the supplemental answer. To this, defendant filed a motion to strike. The motion was overruled, and defendant excepted. We think the ruling was right. The first reply was practically a general denial, but it was incumbered with an admission that some sort of an assignment was made
3 as security for fees. The substituted denial presented no new issue, but, if it did, we are not prepared to hold that the court abused its discretion in allowing it to remain on file. If the ruling be said to be erroneous, the error was without
4 prejudice, for the reason that the so-called "assignment" was not an absolute one. It was a contract for contingent fees, and, as such, it did not transfer the cause of action. Again, the assignment was made after the action was commenced, and it was perfectly proper for the court to allow the case to proceed in the name of the original plaintiff. McClain's Code, section 3766; *Chickasaw County v. Pitcher*, 36 Iowa, 593.

II. Early in the trial, and before resting his case, plaintiff filed an amendment, praying for exemplary damages. He made no additional allegations of fact, but simply demanded five thousand dollars as additional damages, on the facts already pleaded.
5 Defendant moved to strike this amendment. His motion was overruled and this ruling pro-

was not the real party in interest, because of the assignment of the cause of action before referred to. This motion was properly overruled, for the reasons stated in the first paragraph of this opinion.

IV. Defendant complains of some of the instructions given by the court. We cannot consider this complaint, for the reason that we do not have all the instructions before us. *State v. Lauderback*, 96 Iowa, 258 (65 N. W. Rep. 158); *State v. Stanley*, 48 Iowa, 221; *State v. Nichols*, 38 Iowa, 110. The instructions seem to announce correct abstract propositions, and we see no error in those which are embodied in the record. There was certainly no such error as that it may not have been cured by other instructions.

V. In presenting his views of the law to the trial court, the following colloquy occurred between counsel and the judge presiding: Upon the final argument of the case, Mr. Boulton, attorney for the defendant, argued at considerable length to the court that, where a mechanic did work in repairing a sled, he was entitled to retain possession thereof, as against party leaving same with him until he was paid, citing a number of authorities. As he seemed about to continue his argument on that line, the court interrupted him, and said there was no need of citing further authorities on that proposition, as it must be conceded by all. He then read from his typewritten brief an authority, which seemed to the court to be to the effect that, where a person undertook to take by force an article left for repair with a mechanic, the mechanic might resist to any extent before allowing same to be taken before payment for repairs, and said to the court that there could be no doubt but what that was the law also. The court then said: "I don't think that is the law." Mr. Boulton then said:

"This authority so holds." The court then said: "It certainly can't be the law that a person could go to the extent of killing a man to protect a claim of two dollars and fifty cents. The law does not hold human life so cheap as that." This occurred in the presence of the jury. It does not appear that any exception was taken to the remarks of the court; but, if proper exceptions were taken, we do not think the defendant has any ground for complaint. The court announced a correct rule of law, and no prejudice resulted. Bishop, Cr. Law, sections 861, 862-875, 706, 656.

VI. Appellee introduced on the trial the evidence of one George Meggitt, taken in a criminal proceeding had previous to the trial of this case, wherein appellant was tried under an indictment for assault with intent to commit a great bodily injury
9 upon appellee. Error is assigned upon the admission of this evidence. As we do not have all the evidence adduced, we must presume that sufficient preliminary proof was offered to make this evidence competent if it was admissible under any state of facts. It appears that the evidence was taken in short-hand on the trial of the criminal case, and the reporter who took it was present at this trial, and gave testimony as to what Meggitt said in the former proceedings. We think that if the proper foundation was laid, as we must assume it was, the evidence was admissible, for it appears that the witness Meggitt was fully cross-examined by counsel at the trial of the criminal case, and, although the parties are not precisely the same, yet such evidence is almost universally admitted. Greenleaf, Ev., section 164; *Charlesworth v. Tinker*, 18 Wis. 633, and cases cited; Bradner, Ev., page 313;

VII. Complaint is made of the ruling of the court permitting plaintiff to introduce what is known as the "American Table of Mortality." This was shown to be a standard table, used by leading life insurance companies, and was properly admissible. We do not wish to be understood as holding that such tables must be proved to be so used before being received in evidence. We merely say that, if such evidence is required, it was furnished in this case.

VIII. Defendant sought to impeach the evidence of Meggitt by proving contradictory statements made out of court. As no foundation was laid for this kind of evidence, the court properly rejected it.

Some other questions are discussed by counsel, but they are all disposed of by what has heretofore been said. We discover no prejudicial error in the record, and the judgment is **AFFIRMED**.

JOSEPH H. BARRETT, *et al.*, Appellants, v. THOMAS KEVANE, *et al.*

Taxation: GOVERNMENT LANDS: Construction of statute. Under 1 Revision 1860, section 711, sub-division 7, providing that government lands entered shall not be taxed for the year in which the entry, location or purchase was made; and section 712, making all real estate not exempt by the preceding section, subject to taxation,—lands entered in 1869 were not exempt from taxation for the year 1870, no matter when the patent issued.

SAME: Presumptions. Under Code, section 897, providing that a tax deed is presumptive evidence that the land was subject to taxation, and had been listed and assessed, the fact that the county records do not show that the land was not assessed for the year 1870, will not overcome the presumption of validity of the sale.

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Appeal from Buena Vista District Court.—HON. LOT THOMAS, Judge.

SATURDAY, JANUARY 23, 1897.

ACTION in equity to redeem land from tax sale, and for general equitable relief. There was a hearing on the merits, and a decree in favor of the defendants. The plaintiffs appeal.

T. D. Higgs and F. J. Brown for appellants.

James De Land and A. D. Bailie for appellees.

ROBINSON, J.—On the seventeenth day of June, 1869, Converse Barrett entered the south half of section 22 in township No. 92 N., of range No. 37 W., in Buena Vista county, and in January of the next year a patent therefor was issued to him. On the twenty-fourth day of December, A. D. 1873, he died intestate, leaving a widow and two minor sons. The latter have become of legal age, and are plaintiffs in this action. They allege that they are the owners of the land described. The defendants Thomas Kevane, James Kevane, Catherine Carney, and R. H. Brown claim to own the land by virtue of certain tax deeds. One of those was issued in October, 1874, and purports to convey all of the half section excepting the northwest quarter of the east half, on account of a sale made in October, 1871, for the delinquent taxes of the year 1870. Another was issued in May, A. D. 1877, and purports to convey the northwest quarter of the east half of the half section, on account of a sale for delinquent taxes made in February, A. D. 1874. A third tax deed was issued in August, A. D. 1879, and purports to convey the south half, and the northeast quarter of the east half, and the west half, of the half

section, on account of a sale for delinquent taxes made in October, 1875. The defendants named, claim to be the owners of the title conveyed by those deeds, and by a quit-claim deed for the half section executed by the widow of Converse Barrett in the year 1877, and ask that the title to the land be quieted in them according to their respective interests. The district court adjudged that the plaintiffs were not entitled to any relief, and quieted the title to the land in the defendants as prayed.

I. The petition of the plaintiffs attacks but one tax sale,—that for the delinquent taxes of the year 1870, made in the year 1871. The grounds upon which the sale is said to have been illegal are substantially as follows: (1) That the land was not subject to taxation for the year 1870; (2) that it was not in fact listed for taxation, nor assessed, for that year; (3) that the sale was fraudulently conducted, in that all the parties who bid at the sale agreed not to bid against each other, and to share the sales between them. There is no evidence whatever to sustain the last
1 ground, and it will not be further considered.

The statute in this state in force in the year 1870, provided that "government lands entered or located, * * * shall not be taxed for the year in which the entry, location or purchase was made." Revision, 1860, section 711, sub-division 7. As has been stated, the land in question was entered in the year 1869, and under the provision quoted was not taxable for that year. But the liability of land for taxation does not depend upon the issue of a patent. In many cases it is taxable before the patent issues. *Goodnow v. Wells*, 67 Iowa, 659 (25 N. W. Rep. 864). Section 712 of the Revision of 1860, made all real property not exempted from taxation by the preceding section subject to taxation. As that only relieved the land in question from taxation prior to and for

the year it was entered or located, it was subject to taxation for the year 1870. Section 720 of the Revision of 1860, required all real property subject to taxation to be listed for that purpose in the year 1861, and every second year thereafter, and provided that in each year in which real estate was not regularly assessed it should be the duty of the assessor "to list and value any real property not included in the previous assessment." In case real estate subject to taxation had been omitted from assessment by the officer whose duty it was to assess it, the county treasurer was required to assess it. Section 752. It follows from what we have said that not only was the land in question taxable for the year 1870, but the law required that it be listed and assessed for that year.

II. The claim of the plaintiffs that the land was not assessed for the year 1870, is based upon the fact that the records of Buena Vista county do not show that it was so assessed; but it is shown without
2 dispute that the courthouse of the county, and nearly all of the public records therein contained, were destroyed by fire in January, 1877. Some account books of the treasurer's office, and a record book, containing proceedings of the board of supervisors, the tax-sale books, some account books, and a few others, belonging to the auditor's office, were saved; but all other records belonging to these two offices, including assessor's books, were destroyed. The tax deeds are presumptive evidence that the land in question was subject to taxation for the year for the delinquent taxes of which it was sold; that the taxes were not paid before the respective sales; that the land had not been redeemed from the sales when the deeds were issued; that the land had been listed and assessed, the taxes levied, and the land duly adver-

thus authorized have not been overcome by the plaintiffs. The fact that the county records, as they now exist, fail to show these things to have been done which the tax deeds require us to presume were done, is entitled to no weight, in view of the destruction of the records shown. The record of the proceedings of the board of supervisors, which was preserved, shows that the taxes for the year 1870 were duly levied at the time and in the manner required by law, and none of the records preserved tend to rebut, in any manner, the presumptions which the tax deeds authorize. We conclude that the plaintiffs have failed to show any illegality in the tax sales and tax deeds which they have attacked, and that the decree of the district court is fully sustained by the evidence.

This conclusion makes it unnecessary to consider the effect of the various deeds under which the defendants claim, and which are not alleged to be invalid, had the plaintiffs been successful as to the sale and deed of which they complain; and it is not necessary to determine other questions discussed by the counsel. We do not find in them anything material to the disposition of the case. The decree of the district court is **AFFIRMED**.

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107	38

J. W. DAVIS v. T. J. CALDWELL, *et al.*, Appellants.

Referee: LOSS OF JURISDICTION. A referee has no jurisdiction to
2 act after the time he was required, in the order of appointment, to
make his report.

SAME. An order by the court, after the expiration of the time fixed
8 for filing a referee's report, directing that the per diem of the sev-
eral reporters "heretofore" and "hereafter" acting for such referee
be taxed to the county, is insufficient to validate the referee's
report, made after the expiration of such time.

ESTOPPEL. A party assenting to a continuance by the referee beyond
1 the time he was required to make his report, and appearing and
taking part in the hearing, without objection, is not estopped to
deny the jurisdiction of the referee. *Goodale v. Oase*, 71 Iowa,
484 (82 N. W. Rep. 414) *followed*.

Appeal from Shelby District Court.—HON. WALTER L.
SMITH, Judge.

MONDAY, JANUARY 25, 1897.

ACTION in equity to recover an amount alleged to
be due on a promissory note, and to foreclose a mort-
gage given to secure its payment. The defendants
admitted giving the note and mortgage, but pleaded
payment and other defenses. A referee was appointed
to take the evidence and make a report. He did so,
but on the motion of the plaintiff his report was
stricken from the files, and the defendants appeal
from that order.—*Affirmed*.

Byers & Lockwood for appellants.

G. W. Cullison for appellee.

the court that this cause is a proper one for reference, requiring an accounting, it is ordered that the partial submission had herein, be set aside, and L. W. Ross, Esq., is hereby appointed referee to take evidence and report herein before the first day of the next term of this court." The first day of the next term of court was March 29, 1892. The referee appointed took the required oath, and gave the parties in interest notice that he would commence the hearing of the case on the tenth day of March, 1892, in Avoca. The parties appeared by their attorneys at the time and place named, and the taking of evidence was commenced. At the end of the next day, the attorney who represented the plaintiff stated that he had been called to a distant part of the state, and asked that the further taking of evidence be continued to a further day, to be fixed by the referee. The request was assented to by the defendants, and granted by the referee. On the twenty-second day of March the referee fixed March twenty-fourth as the day on which to commence the further hearing of the case, and the parties to it were notified accordingly. The time was not satisfactory to the attorney for the plaintiff, and he requested that a later date for the hearing be fixed. That was done, and the referee fixed April 8, 1892; but that date was not satisfactory to either party, and the twenty-eighth day of the the same month was fixed, and the hearing was resumed at that time, and the taking of evidence was then concluded, both parties appearing without objection and taking part in the examination. When it was finished the parties stipulated that an abstract should be prepared, and arguments be completed by the fifteenth day of June. That time was further extended by agreement of parties, and the report of the referee was not filed until the fifteenth day of February, 1893. All the continuances had were

assented to by both parties, and no objection to the delay in preparing and filing the report appears to have been made until after it was filed. On the twenty-eighth day of March, 1893, the plaintiff, by motion, asked the court to strike the report from the files, because not filed within the time specified in the order which appointed the referee. The motion was sustained, and we are now asked to review that ruling.

The question thus presented is not an open one in this state. The right of a referee to make a report after the time in which he was required to do so by the order of the court, was considered in *Goodale v. Case*, 71 Iowa, 434 (32 N. W. Rep. 414); and it was there held that, when the time so fixed expired, his authority to act as referee was at an end, and that a report made after that time should not be received. That holding finds support in *De Long v. Stahl*, 13 Kan. 558, in which the supreme court of Kansas, in considering the report of a referee made after the time fixed by the order of the court for making it, said: "The referee is an officer whose powers and duties are created by the order of the court. If he go outside the limits of that order, his acts are void. When the time within which, by the terms of the order, he must act, has expired, his office has ceased, and his powers are ended. Neither party is obliged to take any further notice of the reference. Here he was ordered to make his report by a specified time. When that time had passed without the filing of a report, his powers as a referee were at an end, and any further action was as though no order of reference had been made. Nor did the confirmation of the report make valid that which was before void.

however, that the appellee in this case is estopped to question the authority of the referee to act in this case, by his conduct in appearing before the referee, and taking part in the hearing, after the time allotted for making the report had expired, without objection. It appeared in *Goodale v. Case, supra*, that the plaintiff, who there objected to the report of the referee, had appeared before him after the time within which he was authorized to act had expired, and given testimony. But this court said, in effect that, as the referee's authority had expired, it was not revived by the presumed assent of the plaintiff. The referee's lack of power in such a case is jurisdictional, and the defect cannot be supplied by the agreement of parties. In that respect it differs from the defects which were involved in numerous cases cited by the appellants, as an irregularity in the submission, a failure of the referee to take the required oath, an insufficient notice of hearing, and other defects of a similar character. A few of the authorities cited, tend to support the claim of appellants that a party may be estopped by his conduct from objecting to the actions of the referee taken after the proper time, but we are not inclined to overrule the case of *Goodale v. Case*, which we regard as conclusive against the claim of the appellants.

One further point may be noticed: On the thirty-first day of March, 1892, two days after the expiration of the time fixed for filing the report, the court
3 made an order in this case as follows: "It is ordered that the per diem of the several reporters heretofore or hereafter acting for the referee herein be taxed to Shelby county." But this order did not purport to extend the time in which the referee was authorized to act, and the words "or hereafter," as used, cannot be given that effect. It is possible that such an extension was contemplated by the parties.

and, had it been given, the order quoted would have provided for the payment of services rendered by the reporters during the extended time; but the court failed to make an order granting the referee additional time in which to act. We conclude that the order of the district court from which this appeal was taken is correct, and it is **AFFIRMED**.

G. C. ROBINSON v. THE CITY OF CEDAR RAPIDS, Appellant.

Contributory Negligence: JURY QUESTION: *Municipal corporations.*

1 Contributory negligence is a question for the jury, where plaintiff came out of a lighted store, and, in trying to cross a dark alley by its side, stepped from the curb upon a slanting and ice-covered apron with worn and broken cleats thereon, the top of which commenced six inches below the curb, which facts were not known to plaintiff, though he had for a long time worked within a short distance of the defect, and knew that the walk was above grade.

SAME. One unacquainted with an alley crossing has the right to rely on its being in a reasonably safe condition and is not bound to

2 anticipate that there is a drop at the end of the sidewalk of six inches, and from that point a slanting apron with cleats which are old and worn and partly removed, and which apron is made slippery by the accumulation of snow and ice.

Harmless error: EVIDENCE: *Objections.* The erroneous admission

3 of testimony that the witness had her attention called to a defective sidewalk by falling thereon, is without prejudice, where she was afterwards permitted, without objection, to tell how, when, and where she fell.

SAME. The erroneous admission of evidence that changes were made

4 in a crossing after an accident thereon, which the court afterwards instructed the jury not to consider, is not prejudicial where the necessity for repairs and alteration was evident.

100	662
107	515

100	662
134	715

100	662
144	262

Municipal Corporations: NOTICE OF INJURY: Statute of limitations.

- Under Acts Twenty-second General Assembly, providing that no
6 suit shall be brought for personal injuries against a city, after six months from the time of the injury, unless notice shall have been served on the city within ninety days from the injury, an action therefor may be brought at any time within the general statutory limitation of two years, when such notice is served.

Appeal from Linn District Court.—HON. WILLIAM P. WOLF, Judge.

MONDAY, JANUARY 25, 1897.

ON the evening of March 10, 1894, in passing along the east side of Third street east, in Cedar Rapids, at its intersection with the alley between First and Second avenues, the plaintiff fell, and was injured. From the street walk, which was high above grade, to the paving in the alley, there was a slanting apron, with cleats, the upper end being about six inches below the walk. The cleats were old and worn, and partly removed, and the apron made slippery by the accumulation of snow and ice. The plaintiff alleged negligence on the part of the city in so maintaining its streets, and recovered judgment. The defendant appeals.—*Affirmed.*

Warren Harman and J. J. Powell for appellant.

Rickel & Crocker for appellee.

LADD, J.—The defendant insists that the evidence conclusively shows plaintiff to have been guilty of contributory negligence, and that, for this reason, the case ought not to have been submitted to the jury.

1 There were but two witnesses to the occurrence, and they agree that the night was cold, dark, and windy, and that there was some snow, or frost, in the air. The grocery store out of which plaintiff and

Grimmell came was next to the alley. The walk in front of the store was lighted from within, but the alley was so dark that neither could see. The plaintiff had lived in Cedar Rapids eight years, and during that time had worked a block and a half distant, but he testifies that he did not remember ever having passed over this particular crossing before, and did not know its condition. He knew the walk was high above the grade. Grimmell was lame, and familiar with the place, and when he crossed it found it necessary to get down and feel his way. He could see the end of the sidewalk, but not into the alley.

2 The plaintiff had the right to rely upon the alley crossing being in a reasonably safe condition, unless he knew otherwise. He was not bound to anticipate a drop at the end of the sidewalk, of six inches, and, from there, on a slanting apron in such a condition on one of the principal streets of the city. He was simply required to exercise that degree of care and caution a prudent person would ordinarily use in passing along the streets of the city, and we think the question as to whether he did so was fairly and properly submitted to the jury.

II. Mrs. Truesdale, witness for plaintiff, after testifying to the condition of the alley crossing, was asked what especially called her attention to the place, and, over the objection of the defendant, answered, "I fell." Thereafter she detailed the particulars of the occurrence, without objection.

3 If there was any error in the ruling, it was waived by afterwards permitting the witness

jury. Striking evidence out after the jury has heard it, does not always remedy the mistake in erroneously admitting it, and trial courts cannot be too cautious in avoiding the necessity of so doing, and especially when the law excluding such evidence is well settled. In this case the defendant was not prejudiced, as the necessity for repair and alteration was evident.

IV. The defendant excepts to the seventh instruction, on the ground that the jury was told, in substance, that, if the crossing was in a dangerous condition by reason of the accumulation of snow and ice, and had so continued for such a length of time that the city, in the exercise of ordinary care, should have known thereof, then the city was negligent, and did not, in this connection, include a reasonable time within which the accumulation of snow and ice might be removed. The statement of the law in this portion of the instruction is subject to the criticism made, but the rights of the defendant were fully guarded in another part of the same instruction, in which the jury are told that the "defendant cannot be charged with negligence on account of the accumulation of snow and ice, if such had fallen at the time, or had fallen such a short time before as that the defendant could not have been charged with want of ordinary care in failing to remove the same prior to the time of the accident."

V. The defendant pleaded the statute of limitations. The injury was received March 10, the original notice served September 6, and the petition filed September 25, of the same year. No other notice was served. It will be observed that the action was begun by service of the original notice more than three months, and within six months, after the accident. Chapter 25 of Acts of the Twenty-second General Assembly, provides that for injuries such as

this, "no suit shall be brought against the corporation" after six months after the time of the injury, unless written notice, specifying the place and circumstances of the injury, shall have been served "within ninety days after the injury." The general statute of limitation fixes the time within which such action may be brought, at two years. In construing a statute, the purpose should be to give effect to all its provisions. Applying this rule, we conclude that when "notice specifying the place and circumstances of the injury is served" on the defendant within ninety days after the injury (changed to sixty days by the Twenty-sixth General Assembly), the action may be brought at any time within two years; but if such notice is not so served then, the action must be commenced within six months (now three months).—AFFIRMED.

ORPHIE KRAUSE, Appellant, v. JAMES H. LLOYD.

Amended Petition: REPETITION. The original petition in an action,

- 1 under Code, section 212, for collusion on the part of an attorney with intent to deceive a court or party, alleged that defendant
- 2 colluded with his client to interpose a fictitious counter-claim in an action before a justice, so as to enable the client to appeal, and
- 3 that the case was appealed and expenses incurred by plaintiff on the appeal, but did not allege that defendant appeared for his
- 7 client, on appeal. A demurrer was sustained on the ground, that it did not show that the expenses incurred by plaintiff were caused by defendant's conduct. The amended petition alleged that defendant appeared for his client in the trial, on appeal. *Held*, that it was error to strike out the amended complaint as a mere repetition of the original.

Sustaining Demurrer: ONE GROUND GOOD: Appeal. Where a

100	666
106	808
100	666
111	58
100	666
116	508
100	666
1130	508
100	666
136	626

not make the ruling on the demurrer an adjudication on any question raised by the demurrer,—does not change the rule as to waiver by answering over after demurer is *sustained*.

Appeal from Floyd District Court.—HON. P. W. BURE,
Judge.

MONDAY, JANUARY 25, 1897.

APPEAL by the plaintiff from a judgment rendered against her for costs “because of want of petition.”—*Reversed*.

Robert Eggert for appellant.

Reiniger & Lloyd for appellee.

GIVEN, J.—I. This action is to recover treble damages, under section 212, of the Code, which is as follows: “An attorney and counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court, or judge, or a party to an action or proceeding, is liable to be disbarred, and shall forfeit to the injured party treble damages, to be recovered in a civil action.” On May 3, 1894, the plaintiff filed her petition stating that the defendant is a duly-admitted and practicing attorney at law; that in July, 1893, L. L. Krause, her assignee, instituted two suits in justice’s court, one against C. A. Danforth and the other against Charles Walbaum, in each of which he asked to recover about three dollars for money had and received; and that the defendant Lloyd appeared as attorney for the defendant in each of said suits, and as such attorney, answered in each case, and in each pleaded and consented to be pleaded, and caused to be pleaded, a counter-claim for twenty-seven dollars and fifty cents. It is further alleged “that the said counter-claim in each case was fictitious and fabricated, and, caused to be fabricated

by the defendant, James H. Lloyd, and consented thereto by him, all for the sole purpose of raising the amount in controversy in each case above the amount of twenty-five dollars; and said counter-claims were pleaded by the said James H. Lloyd, and by him consented to be pleaded, with the full knowledge that the said counter-claims were fictitious, and for the sole purpose of deceiving the court and the said L. L. Krause, so that, in case of being defeated in the justice court, the said C. A. Danforth and Charles Walbaum could, by virtue of the amount in controversy begin more than twenty-five dollars as explained above, obtain an appeal to the district court." It is further alleged that L. L. Krause obtained judgment in each of said cases before the justice; that defendant Lloyd appealed, and caused the defendants in said cases to appeal, to the district court, which appeals would not have been granted but for the pleading of said fictitious counter-claim; that said cases were docketed in the district court, and tried before the jury; and that said L. L. Krause was obliged to defend in said court against the counter-claims, and to be in attendance in said court for five and one-half days, to his damage eleven dollars, and to engage an attorney at an expense of forty-five dollars, —in all, to his damage, fifty-six dollars. Plaintiff also alleges that said claim was assigned to her by L. L. Krause for value, and she asks judgment for one hundred and sixty-eight dollars, with interest. Said counter-claims are attached as exhibits. and in each

in the demurrer, and upon other grounds, hereafter noticed. This demurrer was sustained generally, to which the plaintiff excepted, and thereafter the plaintiff filed an amendment to her petition, alleging, in substance as follows: That defendant Lloyd prosecuted said two appeals to the district court, and in that court did, with intent to deceive said district court, the judges thereof, and L. L. Krause, and to make them believe that said fictitious counter-claims were honest claims, resist two motions, made by Krause, to dismiss said appeals, for the reason that the amount in controversy was but three dollars; that the counter-claims were fictitious, fraudulent, and fabricated, and made and preferred by the defendant to deceive the courts; that this defendant resisted said motions on the ground that the counter-claims were valid, existing claims, knowing well, at that time, and prior thereto, that they were fraudulent, and mere fabrications, originated by said defendant and urged by him with intent to deceive the said court and said Krause; that the district court was, in each instance, deceived by the defendant, and overruled the motions to dismiss the appeals; that the cases were tried to the jury, and on the trial the defendant did not offer nor urge those fictitious counter-claims, and that verdicts were returned for the plaintiff; that L. L. Krause was obliged to engage a lawyer in said cases at a cost of forty-five dollars, and that he lost five and one-half days' time in preparing for, and at the trials, to his damage, eleven dollars. Defendant moved to strike this amendment to the petition, on the ground that it is but a repetition of the matters alleged in the petition to which the demurrer was sustained. This motion was sustained, to which plaintiff excepted, and declined to plead further, whereupon "judgment for defendant

for costs because of the want of petition" was entered, to which plaintiff excepted.

II. One ground of the demurrer is that plaintiff asked to recover damages caused by proceedings in said cases in the district court, but does not allege that this defendant appeared, defended, or took part
4 in said cases in that court, or caused them to be defended therein, or that he in any manner deceived said court. Appellant concedes that the demurrer was properly sustained as to this ground, and says that it was to cure this defect in the petition that the amendment was filed. Having thus conceded, appellant's counsel proceed to urge that the court erred "in sustaining the remaining points of the defendant's demurrer." The demurrer was sustained generally. Therefore we do not know whether it was
5 sustained upon all, or some one, of the several grounds. There being one ground to sustain the ruling, we cannot say that the court erred in sustaining the demurrer; nor can we know what the view of the court was to any one ground of the demurrer. The demurrer was sustained September 7, 1895, and, instead of standing on her petition, as she had the right to do, appellant amended the same. This court has many times held that in such cases the party, by amending, waives the right to appeal from the order sustaining the demurrer. *Brown v. McMahon*, 80 Iowa, 191 (45 N. W. Rep. 761); *Scholl v. Bradstreet Co.*, 85 Iowa, 551 (52 N. W. Rep. 500). In *City of Muscatine v. Keokuk Northern Line Packet Co.*, 47 Iowa, 350, it is said: "Pleading over after a ruling upon a demurrer has been so repeatedly held by this court to be a waiver, that we need not cite the cases
6 announcing the rule." Chapter 96, Acts Twenty-fifth General Assembly does not change the rule in cases where the demurrer is sustained. The

language of that chapter is: "When a demurrer shall be overruled, and the party demurring shall answer or reply, the ruling on the demurrer shall not be considered as an adjudication of any question raised by the demurrer, and in such case the sufficiency of the pleading thus attacked shall be determined as if no demurrer had been filed. No pleading shall be held sufficient on account of a failure to demur thereto." For the reason stated we are not called upon to consider the sufficiency of the demurrer.

III. The defendant's motion to strike was, in effect, to strike the entire amendment, and upon the ground that it was a repetition of the matters alleged in the petition, to which the demurrer had been
7 sustained. The original petition showed that the two cases were appealed from the justice's court because of the amount claimed in the counter-claims, that they were docketed and tried in that court, and that plaintiff incurred expense and loss of time in attending and defending against the counter-claims in that court; but, as was stated in the demurrer, it was not charged that this defendant was accountable for the damages thus alleged to have been sustained. By the amendment to the petition the plaintiff shows that these damages were caused by the conduct of this defendant in appearing as an attorney in those cases. We do not think that the amendment was a repetition of matters already stated, but that same contained additional allegations upon which to charge the defendant with the damages resulting from the proceedings had in those cases in district court. With the petition as thus amended, it was not true that she was in default for want of a petition. Without now determining whether or not the grounds of the demurrer were well taken, we do hold that the court erred in sustaining the motion to strike the amendment to

the petition, and in entering judgment against the plaintiff for costs "because of want of petition."—**REVERSED.**

**ALBERT HANSEN, by His Next Friend, Appellant, v.
THE STATE BANK BUILDING COMPANY.**

Contributory Negligence: USING ELEVATOR. Plaintiff, a boy of eighteen, who was employed in a building in which there were two elevators one of which was used for passengers, and had regular attendants, employed by the owner of the building, while the other had no attendants, and was seldom used, rather than to wait for the elevator in use, went into the other and used it by operating it himself, and in so doing was injured by reason of its being out of repair. He had frequently used it in the same way before, but, without permission, and, so far as shown, without the knowledge of the owner. *Held*, that plaintiff was guilty of contributory negligence, and could not recover of the owner of the building.

Appeal from Woodbury District Court.—HON. GEO. W.
WAKEFIELD, Judge.

MONDAY, JANUARY 25, 1897.

THE defendant company is the owner of what is known as the "Troy Building," in Sioux City, Iowa. In that building was the office of Bradstreet Company Commercial Agency, and Albert Hanson was in its employ about the eighteenth day of March, 1892. The office of the agency was on the third floor of the building, and in the building were two elevators, known as the east and the west elevator, respectively. On the eighteenth day of March, 1892, Albert Hanson, for whom the action is maintained, being then a minor, eighteen years of age, entered the building on the lower floor, being on his way to the agency, and rang the bell for the west elevator, and, after waiting a short time, and finding it did not

appear, he discovered the door of the east elevator ajar, but with no one in attendance. He stepped in, and ran it himself to the third floor, where he stopped it, and leaving the door partly open so he could use it to go down, he went into the office and got some reports for delivery, and came back, and as he stepped into the elevator, or was partly in, it started up, and he was carried nearly to the fourth floor, and was in some manner crowded out of the elevator, and fell some thirty-five feet or more, to the bottom of the elevator pit, and was so injured that his lower limbs and the lower part of his body are paralyzed. This action is to recover the damages sustained, on the ground of the defendant's negligence in permitting the elevator to be out of repair. The petition shows that the operation of the elevator by Hanson was by license or permission of the defendant, and states facts constituting negligence in keeping it in unsuitable condition for such use, and avers diligence on the part of Hanson. The answer denies the averments as to both the license and the diligence on the part of Hanson. At the close of plaintiff's evidence, the court, on motion of defendant, directed a verdict for it, and from a judgment thereon, the plaintiff appeals.—*Affirmed.*

Wright & Hubbard and Lynn & Foley for appellant.

M. J. Sweeley and Lewis & Beardsley for appellee.

GRANGER, J.—It seems to be thought in argument that the court, in directing a verdict, based its ruling on the fact of contributory negligence. The excuse urged for Hansen's attempt to operate the elevator, himself, is the fact that he had many times before done so, and that others, aside from those assigned to

that duty, had been in the habit of so doing. Both elevators were not used for passengers, except that at times the janitor of the building would, at noon, use the east one for that purpose. The west elevator was the one generally in use for passengers, and two boys were employed for that purpose, one for day service, and the other at night. We cannot state how Hansen came to operate the elevator himself, more concisely than to quote a part of his testimony, as follows: "Q. Now, what occasion had you to run the elevator before? A. I run the elevator just this way: Whenever the other elevator was not there, I would get in this one, and run it. Whenever I came in and did not find the other elevator in its position, and did not want to wait, I used the one standing there. I knew that there was a stairway there, and nothing to prevent me from using it. I had seen the janitor use the elevator. I did not know whether it was his duty to run it when the elevator boy was not there or not. I saw him use it in connection with the work. The elevator was not in use for passenger work. Sometimes, when the elevator boy was not there, he used the elevator for the convenience of the passengers. I saw Max Foster run it. He was working in the drug store in the basement at the time. I think I saw him carrying passengers once. I cannot say whether the elevator boys were usually in when Max Foster run it. I do not know that I remember of ever seeing him in it alone. The man on the top floor who ran it worked in an office to the left, towards the south. I do not know his name. I have seen young Holmes run it. I think his first name is Frank. He used to work for Dow. At that time he was working for the *Journal*. I was with him at the time. No one else was with him. That is the only time I ever saw him run it. He operated the lever. Found the elevator when we got in at the bottom of the floor. We

got in together. I rode up with him. Farrell & O'Connor were the elevator boys employed at that time. I do not know if the other elevator boy was employed. The boy they call Riley was the boy I spoke of a while ago, who worked for Jackson. O'Connor was the one working at the time I got hurt. Farrell was working of nights and O'Connor in the daytime, as I supposed. I do not know that I met Riley just before I got hurt. I think I had seen the engineer's boy running the elevator. He was carrying passengers. I do not know that he was employed. I do not know Mr. Toy's boy. I found the door ajar quite often, and other times opened it when I went to get in. I never used a stick. I opened it with my finger. Mr. Duff never came out and told me that there were boys hired to run the elevator; not that I remember of. I could reach in with my finger and unlock it. If it was closed, it would remain closed until I unlocked it in that way. * * * I saw Mr. Deland on one or two occasions when I was running the elevator. I could not swear that he saw me. I was inside, with the door closed, and he was simply at the entrance. He was manager of the building. I saw the janitor on several occasions. Never talked with him about the matter of running it, as I remember of. Never talked with any of the employes about my using the elevator, nor Deland or Toy, and never asked their permission. I simply, if I was in a hurry, and could get into the office quicker that way, would get in and run it without permission." We find nothing in the evidence from which it could be found that the company ever in any way licensed or permitted any person not in its employ to operate the elevator. It does not appear that any person having authority to grant license or permission, even knew of such use. In other parts of his testimony, Hansen says he used the elevator

himself a hundred times or more. He used it on an average of once or twice a week. He had used it often, and for a long time. It is difficult to see how any person, considering it was not regularly used, could have had a better knowledge of its condition and operation than he. He nowhere pretends that he used the elevator because of license or permission. It does appear that he used it rather than wait a little for the elevator in use. It does not appear that the elevator in use did not afford reasonable facilities for the building. It is thought that such a custom had been established in the use of the elevator in question, by persons not in charge of it, as to justify Hansen in using it as he did. We do not think the evidence fairly tends to show that. It does show that people frequently used it when the other was not there, but it does not show that the use was sanctioned by the management of the building. Nor, except in a few instances, does it appear that such use came to the knowledge of the management. And when it did, in a way to call for an expression of approval or disapproval,—which appears to have been but once,—it was disapproved of. The case is not in line with *Railway Co. v. Stout*, 17 Wallace, 657, or *Clampitt v. Railway Co.*, 84 Iowa, 71 (50 N. W. Rep. 673). This is a case in which a person with a safe and convenient way provided for him, without permission, as he says, took an unsafe one, because of which he was injured. This case is more nearly in line with *Pulley v. Railway Co.*, 94 Iowa, 565 (63 N. W. Rep. 328). It is true, in this case there was not the warning, but there is the same failure to adopt a safe course that is provided. The plaintiff is a young man, and the misfor-

ELI HARDING, Appellant, v. THE CHICAGO, MILWAUKEE
& ST. PAUL RAILWAY COMPANY.

Railroads: KILLING STOCK: Negligence. Defendant's section men closed gates opening from D.'s property on the track, twice. After closing them the second time, they stopped to repair the track, about fifty rods distant. D. passed through the gates, and left them open, and plaintiff's cattle, having escaped from his land onto D.'s land, went through the gates on the track, and were killed. *Held*, that the defendant was not liable on account of the fact that said employes failed to return and see if the gates were closed before leaving for the night, though they might have seen the gates from where they were at work.

Appeal from Chickasaw District Court.—HON. A. N. HOBSON, Judge.

MONDAY, JANUARY 25, 1897.

ACTION at law to recover damages for stock killed on defendant's right of way, at a place where, it is claimed, defendant had a right to fence. At the conclusion of the evidence, the court directed a verdict for defendant, and plaintiff appeals.—*Affirmed*.

J. R. Bane for appellant.

J. W. Sandusky for appellee.

DEEMER, J.—Richard and John Donovan are the owners of one hundred and eighty acres of land in Chickasaw county. The south part of this tract is cut off from the main body thereof by the defendant's right of way, and about one hundred yards south of this right of way, and on the south side of the Donovan tract. The railway

thereof. A gate also leads from the highway into the Donovan land. At the time the stock was killed, plaintiff was occupying a piece of land cornering diagonally to the southwest with the Donovan land. On the fourteenth day of December, 1893, some of plaintiff's stock escaped from his field into the highway; from thence they went through open gates from the highway onto the Donovan land, and from there onto the defendant's right of way, where they were killed by a train. The accident occurred some time after 3:30 P. M. The plaintiff claims that defendant was negligent in leaving the gate leading to its right of way open, and in failing to take proper care with reference to the same. The undisputed evidence shows that defendant's section men passed this gate about 7 A. M., found it open, and closed it. They again passed over the crossing some time between 3 o'clock and 4 o'clock P. M., and again found the gate open. They closed it a second time, and passed on east, to a culvert about fifty-five rods east of the crossing, where they stopped to repair it. At this work they were engaged about half an hour. After repairing the culvert, they proceeded on east, to the place where they were stationed, arriving there about 6 o'clock P. M. While the section men were engaged at the culvert, the Donovans passed over the right of way crossing, with a load of hay. They neglected to close the gate after they passed through, and plaintiff's stock reached the track through the negligence of the Donovans in failing to close the gate.

The sole question to be determined on this state of facts is, was the defendant negligent in failing to learn of and close the open gate? Plaintiff's counsel argues that it was, because the gate was in plain sight

regarding the question as to whether the section men could see the gate from the place where they were at work. But, in view of the fact that the court directed a verdict, we must assume, for the purposes of the case, that these men who were engaged at the culvert could have seen the open gate had they looked. Were they negligent, then, in failing to observe that the Donovans had left the gate open under the conditions recited? We think not. They had closed the gate near 4 o'clock, and passed on to their work, which, the record discloses, demanded their entire attention. They were raising the culvert, and were bound to keep a lookout for passing trains, and to do their work as quickly and expeditiously as possible. They had the right to assume that no trespasser would open a gate they had so recently closed, and were not obliged to go back again over the entire line they had so recently traversed for the purpose of ascertaining whether some one had opened up the gates they had just closed. Let us assume, however, that they saw, or were bound to see, the Donovans when they left the gate open. Would they, then, be guilty of negligence? The Donovans were the owners of the land. They had a right to leave these gates open temporarily, and the section men had the right, had they seen them pass through the gate, to assume that they would soon return and close it. The defendant's employes were not bound to remain on guard to determine whether the Donovans would return and do their duty. At the time they left the culvert, they had the right to assume that the gate would be closed by the men who left it open, and were not required to remain to see if they did. We do not think the defendant was guilty of negligence. The judgment is **AFFIRMED**.

THE FIRST NATIONAL BANK OF STORM LAKE, IOWA,
Appellant, v. ZEPH CHARLES FELT
AND H. J. LEYSON.

Note Given to Deceive Comptroller: CONSIDERATION: *Evidence.* In a
1 suit by a national bank upon a note executed to it by defendant,
8 where the bank is solvent, and the rights of creditors are not
4 involved, defendant may show that it was executed without con-
sideration, to take the place, on the bank's books, of a note given
the bank by one of its debtors, after the comptroller of the currency
had objected thereto, and that it was understood by all parties that
the note created no liability against the defendant.

SAME. Evidence that such note was executed to a bank by one of
its officers to take the place, on the books, of a note from a debtor,
2 after the comptroller of the currency had objected thereto; that the
bank officers agreed that the note should create no liability against
the defendant; that the debtor's note was also retained by the
bank, and a mortgage taken thereafter to secure the same,—shows
that the defendant's note was without consideration.

Appeal from Buena Vista District Court.—HON. LOT
THOMAS, Judge.

TUESDAY, JANUARY 26, 1897.

ACTION upon two promissory notes. Jury
waived. Trial to the court. Judgment against plain-
tiff for the costs. Plaintiff appeals.—*Affirmed.*

Wm. Milchrist, A. D. Bailie, and Carr & Parker
for appellant.

Cummins, Hewitt & Wright and F. H. Helsell for
appellees.

KINNE, C. J.—I. These causes were tried below
together, upon the same testimony, and are before us
for determination upon one record. The matters for

consideration upon this appeal arise upon two counts of the petition. The first is to recover of the defendant Felt upon a note for one thousand one hundred and six dollars, signed by him, and payable to the plaintiff. The second is to recover upon a note for six hundred and forty-six dollars and ninety-five cents, signed by the defendant Leyson, payable to Felt, and by him indorsed to the plaintiff. The defense pleaded

to the one thousand one hundred and six dollar
1 lar note, is that it was without consideration,
and executed under the following circumstances:

Warner Bros. were indebted to the bank in a sum in excess of ten per cent. of its capital stock. Included in said indebtedness was a note for two thousand three hundred and six dollars, upon which one thousand two hundred dollars had been paid, leaving due thereon one thousand one hundred and six dollars. This was on May 5, 1892. Prior thereto, the comptroller of the currency of the United States had objected to the extent of the credit given to Warner Bros., and as the answer alleges: "That at said time it was deemed necessary by the officers and directors of the plaintiff bank to so change the form of said indebtedness from Warner Bros. that a portion of it might appear to be the indebtedness of a third person; and to meet such contingency this defendant did, on the day aforesaid, execute his note for the amount remaining due upon the said note of Warner Bros., * * * but executed the same wholly for the purpose of protecting the bank from the criticism that would otherwise be made upon the existence of said overloan to the said Warner Bros. That it was known by all the officers and a majority of all the directors of said bank, that said note was given without consideration, and for the purpose aforesaid, and was so given with the express agreement and understanding had with the said plaintiff that it created no obligation

on the part of this defendant to pay the plaintiff any sum of money whatsoever." It is also averred that, at a meeting of the board of directors of plaintiff, held thereafter, they, with full knowledge of all the facts, ratified all that had been done, and the agreement under which the note had been executed. The other note was given by the defendant, Leyson, a bookkeeper in the bank, payable to the order of Felt, and by him indorsed to the bank, and represented an overdraft of Warner Bros. It was executed under the same circumstances, and to accomplish the same purpose, as the note first mentioned. Plaintiff demurred to the count pleading the defenses above set forth, the demurrer was overruled, and thereafter plaintiff replied in denial of the facts relied upon in the answer. This denial pleaded that Warner Bros. were insolvent; that plaintiff held no obligation of Warner Bros. representing the indebtedness evidenced by the note in suit; that the Felt note was given and accepted in lieu of the indebtedness of Warner Bros. to the bank. By agreement, this same reply applied to that count of the answer wherein the defense to the six hundred and forty-six dollars and ninety-five cents note was pleaded. Upon the trial it appeared that the one thousand one hundred and six dollar note contained a memorandum upon its face that it was given on account of the Warner Bros. indebtedness. It was entered upon the discount register, and thereafter appeared upon the books of the bank. Felt was president of the bank and all of the bank officers knew of the circum-

inclined to the opinion that all the members of the board knew of the execution of the notes, and most, if not all of them, were aware of the purpose for which, and the circumstances under which, the notes had been executed. The one thousand, one hundred and six dollar note, which had been given by Warner

2 Bros., still remained the property of the bank, and in its possession. It was not transferred to Felt, and, in view of what happened thereafter, it appears that neither the defendant nor the bank had any thought that the giving of Felt's note for the amount of the Warner note, was to operate as a payment or discharge of the latter; for the bank, long afterwards, repeatedly recognized the indebtedness of Warner Bros. on the note to it, and took a mortgage to secure the payment of it, which the bank afterwards foreclosed. In October, 1892, Felt's connection with the bank ceased, and he moved to Denver. The first demand made by the bank upon Felt, was by the bringing of this suit, about two years after he had left the state. The facts are, in substance, alike in both cases.

II. Had the defendants the right to show that the notes in controversy were given, only, as an accommodation to the bank, and were without any consideration? Was there, in fact, any consideration
3 for the notes? An affirmative answer to these questions will dispose of every material point raised upon the demurrer or the trial, and will be decisive of the case. That we may not be misunderstood, it should be said at the threshold of this discussion that this is not a question between the federal government, acting through the comptroller of the currency, to close up an insolvent national bank, and to secure and preserve its assets for its creditors. Had the bank become insolvent, and passed into the hands of a receiver, it may be that it

would be assumed that creditors had trusted it on the faith of such apparent assets as these notes, and that the defendant, under such circumstances, would be precluded from relying upon a want of consideration, or such other agreements as are sought to be relied upon in this case. Doubtless there are other circumstances under which these defendants would not be permitted to claim a want of consideration for their notes, or that for any reason they should not be held as valid and binding obligations in favor of third parties, who might have a right, in the absence of knowledge to the contrary, to treat them as such, and who would suffer prejudice if such defenses were permitted. The offense, if any, committed by these defendants against the national government, in attempting, by the course pursued, to deceive the comptroller of the currency as to the real condition or extent of the indebtedness of Warner Bros. to the bank, is not involved in this case. In the case at bar the bank is solvent. No creditor has been in any way injured by reason of the execution of the notes sued upon. As we have already indicated, the bank, as it appears, never looked upon these notes as intended to operate as a payment of Warner Bros.' obligations to it. The bank continued to hold Warner Bros.' note, for which the one thousand one hundred and six dollar note was given by Felt. It did not deliver the note of Felt or of Warner Bros. It did not cancel or satisfy the debt for which these notes were given. It did thereafter take mortgages to secure the very debt from Warner Bros. to it, which appellant now claims these notes were taken in payment of. Every act of plaintiff prior to the bringing of this suit shows clearly that its officers and directors did not consider these notes as assets of the institution, and forcibly supports the claim of the defendants that at no time was there any intention of

holding them liable upon the notes, and that it was not the intent, in taking the notes, to have them operate as a payment or cancellation of the debts of Warner Bros., and that they, in fact, did not satisfy any part of said Warner debts to the bank. If the bank may recover on these notes, the proceeds of its judgments will go to swell its profits. It will get something for nothing, and its officers and directors who connived at and consented to the trick attempted to be practiced upon the comptroller of the currency, by reason of which it is sought to hold the defendants liable upon the notes, will reap reward in common with all the other stockholders of the bank. The bank, if it fails to recover, will be in no worse situation than it was before these notes were given. Appellant claims that the case of *Pauly v. O'Brien*, 69 Fed. Rep. 460, and other cases cited, are decisive as to this question. We do not think so. In *Pauly's Case* a receiver of an insolvent bank brought suit against one who had executed his note to take up and cancel a note then held by the bank. The case involved the questions:—*First*, as to whether there was a consideration for the note; and, *second*, whether one who had thus given his note would be permitted, as against creditors, to say it was without consideration, and that in any event the defendant could not be heard to say there was no consideration for the note. No question of creditors is involved in the case at bar. The bank is solvent, and is seeking to speculate out of an act done by one of its officers,—done with the assent of all the rest of its officers, and with the knowledge and approval of most, if not all, of its directors. No note or obligation was paid in this case, as we have attempted to show. Other cases are cited which are not applicable to the questions before us. Our statute provides that “the want or failure, in whole or in part, of the consideration of a written contract, may

be shown as a defense total or partial, as the case may be, except to negotiable paper transferred in good faith and for a valuable consideration before maturity. * * * Code, section 2114; 1 Daniel, Neg. Inst., section 174; Tiedeman, Com. Paper, section 154. There can, it seems to us, be no question of the right of the defendants to plead and prove a want of consideration for the notes.

III. Has a want of consideration been established? We think this question must be answered in the affirmative. Appellant's claim is that by the giving of the notes the debt of Warner Bros. to the bank
4 was, to that extent, extinguished. From what has already been said, it is clear that such a result was not intended by any of the parties to the transaction. That it was not in fact done is certain; for, if the debts were extinguished, why was the bank, long thereafter, securing this same Warner Bros. paper by mortgage, and still later foreclosing the mortgages, and reducing the indebtedness of Warner Bros. to the bank. This action of the officers of the bank is not consistent with the claim now made, that the defendants' notes satisfied any part of the debt of Warner Bros. It is not necessary to say more touching this matter. The court below was fully warranted in finding that there was no consideration for the notes.

IV. This court has repeatedly held that the judgment of the trial court, entered in a case tried to the court, stands as the verdict of a jury, and will not be interfered with by us unless palpably against the weight of the evidence; that we will not

and of the arrangement and agreement claimed by the defendants. We base our decision entirely upon the fact that the notes sued upon were without consideration. The judgment below is **AFFIRMED**.

LIZZIE DE LAY, Appellant, v. CARNEY BROTHERS.

100	687
105	290
106	635

Estoppel: EVIDENCE. Evidence that defendants had made arrangements with plaintiff's husband that the latter was to build a barn
1 on land belonging to plaintiff, and care for defendant's horses
2 therein, is competent where it is also shown that such arrangement was brought to plaintiff's attention in such manner that she was compelled to act, or be estopped to make any claim for the care of the horses.

Plea and Proof: NOTICE. Under an allegation that plaintiff had full
3 knowledge of a certain contract, and was thereby estopped to assert a claim in opposition thereto, defendant may prove either direct notice, or facts from which knowledge may be inferred.

Appeal from Poweshiek District Court.—HON. D. RYAN, Judge.

TUESDAY, JANUARY 26, 1897.

ACTION at law to recover for the use and occupation of a certain barn. Defense, a general denial and a plea of estoppel. Trial to a jury, verdict and judgment for defendants, and plaintiff appeals.—*Affirmed*.

J. H. Patton and S. R. Clute for appellant.

No appearance for appellees.

DEEMER, J.—Plaintiff claims that she is the owner of a certain barn in the city of Grinnell, which the defendants used and occupied for more than four years, and that the reasonable rental value thereof, for the time it was so used, was two hundred and twenty-eight dollars. The defendants, in answer, filed a general denial, and also pleaded that plaintiff is the wife

of one James De Lay; that, prior to the time it is claimed they took possession of the barn, said James De Lay was in their employ, and received as compensation the sum of nine dollars per week; that
1 on or about December 6, 1889, said De Lay agreed with defendants that he would build a barn upon the property which he and his wife were then occupying as their homestead, and would keep and care for defendants' horses in said barn, and continue in their employ as a teamster, on condition that defendants would pay him ten dollars per week instead of nine dollars; that, under said arrangement, De Lay built the barn and kept defendants' horses, and defendants paid him the sum of ten dollars per week, as agreed upon, until they sold their team, in April, 1894; that defendants did not request of De Lay that he build upon or occupy any property belonging to plaintiff, and did not know, nor do they now, that said De Lay did so occupy or use any property belonging to the plaintiff. The defendants also pleaded that plaintiff was, at the time her husband built the barn, residing upon the lot where the same was built, and had full knowledge of all the terms and conditions under which the building was erected, and of the fact that her husband was receiving compensation for the use and occupancy of the same, and that she never in any way suggested, or intimated, to defendants that she had or made any claim for the use of the barn until long after her husband ceased to work for defendants, and until long after they had paid him in full for his service and for the use of the barn, and then say that

introduced evidence in support of the affirmative matter pleaded by them in defense to the suit, and they also produced evidence tending to show that the barn was built by James De Lay under an arrangement by which he was to build the barn and keep and care for defendants' horses, and was to receive an advance of one dollar per week in his wages as consideration therefor; and, as a part of the agreement, the sum of ten dollars per month was to be retained from his wages to pay for the lumber which went into the barn. The evidence also tends to show that the defendants furnished the lumber for the barn, and that James De Lay paid for it in accordance with his agreement. The jury may also have found that defendants did not know that plaintiffs owned the lot upon which the barn was erected. There was also evidence to the effect that plaintiff stated she was to receive no rent for the barn so long as her husband was in the employ of defendants. James De Lay, who was a witness for the plaintiff in rebuttal, testified that he built the barn and paid for it himself.

We have set forth this much of the evidence for the purpose of showing that the jury may have found for the defendants upon either one of the two main issues in the case. They may have found that the plaintiff did not own the barn, and therefore was not entitled to any compensation for its use, or they may have found defendants' plea of estoppel was fully established by the evidence. Either of such findings would have sufficient support in the evidence.

2 But appellant claims that the court was in error in refusing to strike from the testimony of witnesses Carney and Carver all statements and conversations between them and James De Lay, for the reason that the same was incompetent and irrelevant, not being in the presence or hearing of the plaintiff. We think such evidence was entirely

proper. It was competent and relevant for defendants to show who in fact built the barn, and the contracts and arrangements under which the same was erected. It was also proper for them to show what arrangements they had with plaintiff's husband as to the care of the horses, although the agreements were not had in plaintiff's presence. Of course, such arrangements as they claim they made in this case, would not bind the plaintiff unless the matter was in some manner brought to her attention, so that she was compelled to act in the premises, or else hold her peace. But defendants were not obliged to prove this knowledge by any particular witness or witnesses. They might prove the contract with the husband by one witness, and the plaintiff's knowledge thereof by another; and this they attempted to do in this case. There was no error in the ruling complained of.

II. Some of the instructions are complained of. One, in particular, is assailed because it is said that, while it was proper in a text-book, a law lecture, or in the opinion of an appellate court, yet it was not fit or proper in a charge to a jury. There is no merit in this objection. The instruction announces correct principles of law, and was applicable to the case; and while it proceeds to state some of the reasons why a person may not be allowed to speak the truth under certain circumstances, which may not be usual in instructing juries, yet we see no reason for condemning the instruction on this ground. The reasons given were clearly and tersely stated, and, instead of misleading, they were calculated to assist the jury in arriving at a proper verdict.

III. It is also said that all the instructions given by the court, with reference to the issue of estoppel, omitted the essential element of plaintiff's knowledge of the acts, conduct, and contracts of her husband.

This contention is evidently based upon a misapprehension of the record. It is true that the instructions do not say that plaintiff must have been directly and expressly notified of the contract made by her husband in order to estop her from claiming rent, but they do proceed upon the theory that plaintiff must have known of the acts and contracts of her husband before she would be estopped in this action. In this connection the appellant also claims error in the instructions because, it is said, they do not follow the pleadings, which allege that plaintiff had actual notice of the contracts made by her husband with the defendants. We have heretofore set out the substance of the defendants' answer, and by reference to this it will be seen that they do state that

3 plaintiff had knowledge of the contract under which the barn was built. Under this allegation the defendants could prove not only direct and positive notice or knowledge, but also such a state of facts and circumstances in reference thereto as that a court or jury would be justified in saying that the plaintiff did have notice or knowledge thereof. Defendants were not required to, nor should they, plead the evidence tending to show knowledge. Ultimate facts, only, are to be stated in the pleadings, and any evidence which tends to support these allegations is competent and relevant. The instructions given were applicable to the evidence adduced, and were confined to the issues made by the pleadings. There was no error either in those given or the denial of the plaintiff's requests. We discover no prejudicial error in the record, and the judgment is **AFFIRMED**.

PATRICK DEVINE v. THE CHICAGO, MILWAUKEE & ST.
PAUL RAILWAY COMPANY, Appellant.

Cross-examination. A physician who has testified for plaintiff in an
1 action for personal injuries, as to the nature, extent, and probable
effect of his injuries, and the amount of his charges, cannot be
cross-examined as to whether plaintiff had not told him that the
injuries received were due to his own fault.

Instructions: HARMONY. A petition alleged that the brakeman called
plaintiff's station; that the car stopped; and that plaintiff, while
2 attempting to alight, was thrown off, by the sudden starting of
the car; and that "defendant was negligent in stopping the car
when it did, and in inviting and permitting passengers to leave
the train." The first paragraph of an instruction stated the negli-
gence charged, in the language of the petition. Another paragraph
told the jury that they might find the defendant negligent if, when
plaintiff attempted to alight, the brakeman failed to inform him
that the train had not yet reached the station, and plaintiff could
not see that the train was not yet at the station, and, while exercis-
ing ordinary care, he was thrown off and injured by the starting
of the car. *Held*, that the instructions were not contradictory in
stating the negligence charged.

CONSTRUED TOGETHER. Where the jury are told that negligence was
3 the doing, or omitting to do, what persons of ordinary prudence
would not have done, or omitted, and that contributory negli-
gence was such want of care as was directly instrumental in pro-
ducing the injury, a further charge that plaintiff must use ordinary
care to avert danger that could be "readily" discovered, is not
misleading.

PROVINCE OF JURY. An instruction in an action for personal injur-
4 ies received while alighting from a passenger train, that if the
station was called, and the train soon after stopped, a person
might safely conclude, in the absence of notice, that the train
was arriving at the station, is not objectionable, as taking from
the jury the question, what facts would warrant such conclusion.

Appeal from Clinton District Court.—HON. P. B. WOLFE,
Judge.

TUESDAY, JANUARY 26, 1897.

ACTION to recover for personal injuries received by the plaintiff while alighting from one of the defendant's passenger trains, upon which he was a passenger. Verdict and judgment for six hundred and fifty dollars in favor of the plaintiff. Defendant appeals.—*Affirmed.*

Hayes & Schuyler for appellant.

B. B. Wolfe and McCoy Bros. for appellee.

GIVEN, J.—I. Appellant presents seventy-one assignments of error, many of which are barely mentioned, but not discussed, in the argument. These assignments may be considered under three heads, namely, rulings on evidence, on instructions; and on defendant's motion for a new trial. We have examined each of the thirty-one exceptions to rulings on taking the testimony, and find but one which we think requires consideration in this opinion. All the other rulings were so clearly correct, or without prejudice, that we will not take space to further notice
1 them. Dr. E. C. McNeal was called by the plaintiff, and testified in chief that he attended the plaintiff; to the nature, extent, and probable effect of his injuries, and the amount of his charge. He was not asked to, nor did he, testify in chief to any statements by the plaintiff, nor to any conversation with him on any subject. On cross-examination, defendant's counsel, in a series of questions, asked, in effect, if the witness had had any conversation with the plaintiff in regard to how his injuries were received, and whether the plaintiff had not said "that the injuries he received were his own fault, or words to that effect." Plaintiff objected as not proper cross-examination, and incompetent, and as calling for a conversation between a patient and physician. It is

plain, beyond all question, that it was not a proper cross-examination, and therefore plaintiff's objections were properly sustained. This being true, we need not follow the discussion as to whether or not the conversation asked for was privileged.

II. We next inquire as to the exceptions to instructions given and refused. The petition alleges, and the evidence shows without conflict, that on the night of December 27, 1893,—a dark, rainy
2 night,—plaintiff was a passenger on one of defendant's passenger trains from Cedar Rapids to Lost Nation, he having a ticket for the trip; that on nearing Lost Nation the brakeman called the station, and opened the doors, and that plaintiff passed onto the car platform, and down the steps, for the purpose of alighting from the train; and that as he got off he fell (or was thrown) down, and was injured. The place at which he got off was some distance before the car had reached the depot platform. There is a dispute as to whether the train was stopped from the depot and he got off before reaching the depot platform, plaintiff's claim being that it was stopped, and that he was thrown down by the sudden starting of the train, while defendant contends that it was only slowed up, and not stopped until the depot platform was reached, and that plaintiff was guilty of negligence in getting off when, where, and as he did. This is a sufficient statement of the facts for an understanding of the questions to be considered. Defendant asked seven instructions which were refused, and excepted to paragraphs 1, 3, 5, 6, 7, and 8 of those given. Appellant's first complaint of those given is that paragraphs 1, 3, and 7 are contradictory, in stating the negligence charged. The first states it in the language of the petition, which is as follows: "That the defendant was guilty of negligence in stopping the train where it did, and in inviting and

permitting passengers to leave the train, thereby causing plaintiff's injury." The third directs the jury that, to find for the plaintiff, they must find that he was injured substantially as alleged, that he was free from negligence contributing to his injury, and "that the alleged injury was caused by negligence on the part of the defendant, in calling out the station and stopping its train before it reached the station platform, and by starting up while the plaintiff was attempting to leave the train after said stop." In the seventh paragraph the jury were told, in substance, as follows: That if they believed from the evidence that the plaintiff was a passenger as alleged; that the night was dark and rainy; that the brakeman called the station and opened the doors; that the train came to a full stop; that thereupon plaintiff went on the platform where the brakeman was standing, as if to get off, and that the brakeman failed to warn him of danger, and to inform him that the train had not reached the station, and that plaintiff, on account of darkness, did not, and could not, discover that the car was not at the platform, and that, exercising ordinary care, he attempted to leave the train; and that by the starting thereof he was thrown or fell, and was injured,—they would be warranted in finding negligence on the part of the defendant. To stop the train as alleged, and to have invited or permitted passengers to then and there alight therefrom, was not negligence *per se*, but was negligence, or not, according to the attending circumstances. The petition alleges as one of the circumstances that the train was suddenly started while he was getting therefrom. The matters recited in the seventh paragraph of the charge are all alleged as circumstances which made it negligence to stop the train, and invite or permit passengers to then leave it. The instructions are not contradictory as to the negligence charged, but, as we view them, are, as a whole,

plain, explicit, and harmonious. In the fifth paragraph, in instructing as to the care plaintiff was required to exercise, the court said that he must exercise ordinary care to avoid danger that
3 "could be readily discovered by him." Defendant complains of the use of the word "readily," and contends that thereby plaintiff was only held to avoid such danger as he could quickly, promptly, or easily discover. Taking the words quoted alone, they may warrant such a construction, but, in view of what is said in other parts of the charge and in that instruction, we think it could not be so understood. In the preceding paragraph the jury were instructed, in effect, that negligence was the doing or omitting to do what persons of ordinary prudence would not have done or omitted; and in paragraph 5 they were told that contributory negligence was such want of care on the part of the plaintiff as was a co-operating cause, and directly instrumental in producing the injury; also, that if the plaintiff, by his own negligence, directly contributed to the injury, he
4 could not recover. In the sixth paragraph the court instructed that if the station was called, and the train soon thereafter stopped, "a person might safely conclude, in the absence of notice, that the train was arriving at the station." Defendant insists that, if the conclusion of the plaintiff was material, it should have been left to the jury to find it. In stating, as was done, what facts would warrant the conclusion, the question was not taken from the jury. We have examined the instructions asked and refused, and find that, wherever the law was correctly stated therein, it is embraced in the instructions given. Our conclusion upon this branch of the case is that there was no error in the giving or refusing of instructions.

question of the correctness of the special findings, and of the sufficiency of the evidence. We will not extend this opinion by here setting out or discussing the evidence. It is sufficient to say that, upon a careful examination thereof, we are of the opinion that the special findings and verdict have such support therein that we would not be warranted in disturbing the same. Therefore the judgment of the district court is **AFFIRMED.**

D. L. WILSON, Appellant, v. T. K. RIDDICK, et al.

Land Purchase Contract: VARIANCE BETWEEN DEED AND CONTRACT:

Where a contract for the sale of lands designated the several
8 tracts by name, and for further description gave the names of the owners of adjoining tracts forming the boundaries of the lands sold, a deed, in which there is a variance as to the names of the owners of lands described as boundaries, is not objectionable for non-compliance with the contract, where it appears that it is the land intended to be conveyed.

Rescission: Estoppel. Defendant contracted to convey land to plaintiff at a fixed price per acre, the deed was submitted to plain-
1 tiff for examination, and it appeared therefrom that there was a small shortage in acreage, and that title was not in defendant, but
5 in his wife, who signed the deed. No objection was made by plaintiff, and the deed was deposited in escrow as agreed. *Held*, the plaintiff was estopped from afterwards objecting to the shortage and the condition of title, as ground for rescission.

STATUTE OF FRAUDS: Construction of statute. Code, 1878, sections 3663, 3664, declaring that no evidence of a contract for the transfer
4 of any interest in land shall be competent unless in writing, etc., does not render inadmissible parol evidence as to the identity of lands described in such contract.

Appeal: OBJECTION BELOW. An objection that a contract for the conveyance of a homestead cannot be specifically enforced
2 because the grantor's wife did not sign the contract, cannot be first made on appeal.

Appeal from Buena Vista District Court.—HON. LOT THOMAS, Judge.

TUESDAY, JANUARY 26, 1897

THE parties, Wilson & Riddick, entered into a written agreement for the exchange of real estate, the plaintiff to pay the difference in values. Deeds were to be placed in escrow to await the completion of the transaction. Plaintiff's deed was placed in the First National Bank of Storm Lake, which bank is a party defendant. Plaintiff brings this action, representing a breach of the contract for the exchange of the lands, and asks an injunction to restrain the defendant bank from delivering the deed, and that the contract be set aside. The defendant Riddick admits the contract for the exchange of lands, denies a breach thereof on his part, and, by way of cross-action, avers a performance on his part, or a readiness so to do, and asks a decree for specific performance against plaintiff. The district court gave a decree for defendant, and the plaintiff appealed.—*Affirmed.*

T. D. Higgs and C. D. Goldsmith for appellant.

C. A. Irwin and A. D. Bailie for appellee.

GRANGER, J.—I. The facts essential to a conclusion are quite extended. They were found by the district court, and, slightly modified, they are without dispute. They are as follows:

“(1) On the thirtieth day of July, 1894, the plaintiff and the defendant T. K. Riddick entered into a written contract by which said defendant agreed to sell to the plaintiff certain tracts of land, situated in Fayette county, Tenn., civil district No. 4, and described as follows: The Boyd place, containing six hundred and

ninety acres; the Watkins place, containing eight hundred and four acres; the Hall place, containing six hundred and seventy acres; the Dickinson place, containing five hundred seventy-seven acres; the Salmon Mills place, containing two hundred acres; the Stewart place, containing eighty-nine acres; the Winfrey place, containing one hundred and fifty-two and one half acres;—total, three thousand one hundred and eighty-five and one half acres,—at the price of seven dollars and seventy-five cents per acre for the entire three thousand one hundred and eighty-five and one half acres, which said land the plaintiff agreed to purchase and pay for as follows: By warranty deed to property then owned by him in the town of Storm Lake, Buena Vista county, Iowa, at the agreed price of five thousand, seven hundred dollars; by cash to be paid January 1, 1895, five thousand dollars; by note due January 1, 1896, three thousand, four hundred and ninety-six dollars and ninety cents; by note due January 1, 1897, three thousand, four hundred and ninety-six dollars and ninety cents; by note due January 1, 1898, three thousand, four hundred and ninety-six dollars and ninety cents; by note due January 1, 1899, three thousand, four hundred and ninety-six dollars and ninety cents. The land is further described as lying on both sides of the Somerville and Covington road, and bounded generally as follows: On the north by the lands of J. S. Rhea and Mrs. Harvey and Mrs. Morris; on the east by the lands of Eubanks, Mr. Morris, and the Hobson estates; on the south by the lands of Rorang, Reichart, Winfrey, and Watkins; on the west by the lands of Williams, Wilson, and Robertson.

“(2) The defendant also agreed to furnish the plaintiff an abstract of the title to said lands on or before the fifteenth day of August, 1894, and to execute a warranty deed for said land to Wilson, and

deliver the same to the Fayette County Bank, of Somerville, Tenn., on or before August 20, 1894. And the plaintiff, Wilson, was to furnish the defendant an abstract of title to his Storm Lake property, and execute a warranty deed for the same to Riddick on or before the twentieth day of August, and deliver the same to the First National Bank of Storm Lake, Iowa.

"(3) Wilson was further required to execute to Riddick promissory notes for the last four payments to be made on the land, to be secured by vendor's lien retained on the land. And also to secure to Riddick the payment of the five thousand dollars to be paid January 1, 1895, by depositing with the cashier of the First National Bank of Storm Lake, notes or other valuable securities of the value of five thousand dollars, and to procure and forward to Riddick a certificate of said cashier that said notes or securities, properly indorsed, and made negotiable, had been deposited on or before the fifteenth day of August, 1894.

"(4) Possession of the property on both sides was to be delivered on January 1, 1895, and at that time an exchange of papers was to be had.

"(5) On or prior to August 8, 1894, the plaintiff executed a deed to the Storm Lake property to Riddick in accordance with the terms of said contract, and deposited the same with the First National Bank of Storm Lake, and at the same time deposited with said bank the sum of five thousand dollars, and caused a notification thereof to be made by the president of said bank, and sent to the defendant Riddick, notifying him that the plaintiff had placed in said bank, as per said contract, five thousand dollars cash and a warranty deed to defendant duly executed for the Storm Lake property.

"(6) At the time of the execution of the contract of July 30, the defendant Riddick did not have title to the Tennessee land, but the title thereto was

in the name of Amelia Pulham, who was at that time wife of the defendant. As to whether the plaintiff at or prior to the time the contract was made was informed that the title was in Amelia Pulham, there is a close conflict in the evidence, but I am of the opinion that the evidence is not sufficient to charge him with such knowledge. But about the middle of August, the defendant furnished the plaintiff an abstract of the title to the Tennessee land, and at this time he became informed that the title to the land was in Amelia Pulham.

“(7) After receiving the abstract of the title to the land, the plaintiff went to Tennessee, and saw the defendant Riddick about August 27. Prior to that time it had been ascertained by actual survey
1 that the Boyd place fell short about fifty-nine acres from that stated in the contract, and that the entire piece of land fell short forty-eight and one-half acres, and that in the entire tract there were only three thousand one hundred and thirty-seven acres, instead of three thousand one hundred and eighty-five and one-half acres, as stated in the contract. But Wilson, before he left Storm Lake for Tennessee, had been informed that in a survey of the land there was found to be a shortage.

“(8) The defendant Riddick did not execute and deposit with the Fayette County Bank, of Somerville, Tenn., a deed to Wilson for said land by the twentieth day of August, as required by the contract; but prior to that date Wilson was informed that, owing to some difficulty in completing the survey of that land, it would not be convenient for Riddick to deposit the deed by that time, and, being so informed, Wilson acquiesced in and consented to further time.

“(9) On the twenty-fifth day of August the defendant and his wife executed a warranty deed for the several tracts of land described in the contract to

Wilson, expressing the quantity of land as the total number of acres being estimated at three thousand one hundred and thirty-seven, excepting from the operation and effect of the deed one-half acre on the Watkins place, on which are some graves and monuments; also one acre of land upon which is erected the church called "Pulham Chapel," which is also in the Watkins place.

"(10) During the latter part of August, while the plaintiff was in Tennessee, this deed was exhibited to him for examination and inspection, and for that purpose he retained it several days, and then returned it to Riddick. During this time the deed was read over, and the lines were traced out and compared with the plat of the land in plaintiff's possession, and the plaintiff was fully informed of the shortage in the quantity of the land, and of the reservations made in the deed, and of the form in which the deed was made and executed, and knew at the time that the title was vested in the name of the wife of the defendant Riddick.

"(11) At that time it was mutually understood between the plaintiff and defendant Riddick that the condition of the title and the deed in the form in which it had been executed was satisfactory to both parties, and that the parties would go on and close up the deal, and that plaintiff would take the land, and pay for the actual number of acres in the tract at the rate of seven dollars and seventy-five cents per acre; and with that mutual understanding between the parties Riddick went on and deposited said deed with the bank, as required by the contract.

"(12) The plaintiff went on to make his arrangements to vacate the Storm Lake property, and to take

November gave directions to one R. A. Rhea, who had been the agent of the defendant, Riddick, to manage the land for him, and who was during this time still looking after it for the defendant, and whom the plaintiff had engaged to look after the renting and selling of the land for him in his absence. At various times from the date of his visit in August up to the twenty-second day of November, the plaintiff wrote to Rhea, giving him directions in regard to renting and selling the land, and in every way treating the trade as a fixed fact. In some of these letters he mentioned the fact of one R. H. Brown having commenced a suit against him for the sum of five hundred dollars as commission for services claimed to have been rendered in negotiating the trade with Riddick. And on the twenty-second day of November he wrote a letter to Rhea, saying: "The way things are situated, I consider that I have no interest in the land, or the tenants thereon." But, again, on the twenty-fourth day of November, he wrote to Rhea, saying: "Pay no attention to the letter I wrote you the 22d, only to let Wortham know that I mean to burst up the trade;" and in the same letter directs Rhea to consult with Riddick about renters, and to tell him that he was coming down with others, with his goods.

"(18) On November 6, the plaintiff wrote the defendant Riddick, telling him that R. H. Brown was asserting a claim against him of five hundred dollars, for commission, and that he was threatening to commence suit, and saying: "My goods are all packed, and we are sleeping on a borrowed bedstead. Will you please notify the bank that you declare the trade off, and I will bring the deed with me. I don't want to be detained. At your request, I will sell the house if I don't get over twenty-five hundred dollars for it, or bring the deed to you, and you can deed to whom you please." And, again, on the twentieth day of

November, the plaintiff wrote to the defendant, saying, after referring to the Brown suit: "You consult Rhea in regard to renters: Keep the best. I have four that will come with Livermore and Hall. Keep the Dickinson house for the two families, and the place where the blacksmith lives. You state that your railroad fare would cost nothing to come to Storm Lake and assist me. Your first payment will be ready for you when you get here. Pay no attention to the petition or complaint." The petition and complaint here mentioned has reference to the petition in this case filed on the tenth of November, 1894.

"(14) Prior to the writing of this letter, and on the tenth day of November, the plaintiff filed his petition in the clerk's office, and commenced this action. After the commencement of the action by Brown against the plaintiff, the plaintiff did nothing more towards moving to Tennessee to take possession of the land, nor did he give to the defendant any notice of his purpose in relation to carrying out the contract, other than is contained in the several letters hereinbefore referred to.

"(15) The defendant Riddick appeared in Storm Lake at the January, 1895, term of court, when he was advised that the plaintiff would not proceed further in carrying out the contract for the purchase of the land. But prior to this time Wilson had drawn out of the First National Bank the money that he had formerly deposited, and had requested the bank to return to him the deed to the Storm Lake property. This the bank refused to do.

Up to the time of the commencement of this action, the defendant had complied with all the conditions of the contract, to be performed by him, furnishing to the plaintiff an abstract of title to the Tennessee lands, and making Wilson a sufficient warranty deed, executed by himself and wife, and

deposited the same in the bank, as required by the contract, which was acquiesced in and considered satisfactory, and a sufficient compliance with the contract by the plaintiff, after having a full knowledge of all the facts relating to the land and the condition of the title."

To meet the contentions in this court, there should be added to the foregoing facts, the following: That at the time of making the contract for the exchange of property, the plaintiff was the head of a family and a married man; that the Storm Lake property that the plaintiff was to convey was his homestead; that his wife did not sign the contract for the exchange of lands, but she did sign, with her husband, the deed of the homestead placed in escrow with the defendant bank.

II. Appellant insists that there can be no decree for specific performance against him, for the reason that his wife did not sign the contract of which specific performance is asked, because the property
2 he must convey under such a decree is a homestead, and his wife did not sign the contract. Reliance is placed on Code, section 1990, as follows: "A conveyance or incumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." It is said by appellant that there is no such issue in the case, and that seems to be true. Appellant answered the cross-petition, in which the relief by way of specific performance is sought, by denials, admissions, and by pleading matters of defense, but there was no plea to justify the claim of homestead right as a defense. The wife is not a party. The point now urged does not seem to have been presented to the district court. The facts as to the homestead character of the property came into the record only as incidental to other questions. It will be observed that the
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district court made no findings on that question, and we think it should not be entertained on this appeal. We try only the issues presented to the court below. *Pierce v. Early*, 79 Iowa, 199 (44 N. W. Rep. 890). A defense not pleaded below will be disregarded on appeal. *Thomson v. Lee County*, 22 Iowa, 206; *Barlow v. Brock*, 25 Iowa, 308; *Lower v. Lower*, 46 Iowa, 525. There are numerous holdings to this effect.

III. It is urged that there can be no decree for specific performance, because the deed placed in escrow by defendant described land different from that described in the contract. With the exception of the shortage shown by the finding of fact, we do not understand but that the deed conveys the land
3 agreed to be conveyed by the contract. It is true, the descriptive language in the contract and that in the deed are somewhat different. Looking to the findings of fact, it will be seen that the three thousand one hundred and eighty-five and one-half acres of land consisted of different "places," severally known as the "Boyd Place," "Watkins Place," etc., and the land is further described as lying on both sides of the Covington road, and bounded on the different sides by other lands, owned by other parties named. By the contract the land is described as bounded on the north by lands owned by J. S. Rhea, Mrs. Harvey, and Mrs. Morris. In the deed it is shown as bounded by lands owned by Eubanks, Garret, Harvey, Seay, and Rhea. There is somewhat of a difference of descriptions as to the other sides of the land, but without doubt it is the land intended to be conveyed.

The contract was not to convey by any particular description, but to convey particular land.
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The identity of the land is shown, more or less, by oral evidence, which appellant says is incompetent under the statute of frauds, reference being had to the provision that oral evidence is not competent to show

a contract for the creation or transfer of any interest in land except leases for a term not exceeding one year. The import of the law is misapprehended. The sections of the Code are 3663 and 3664, and they have reference only to evidence to establish *contracts* for the creation or transfer of interests in land. The contract in this case is in writing, by which the interest is created. The evidence complained of in no way creates or transfers an interest. Mainly, it is directed to the identification of the land with that described in the contract. For that purpose it was competent. The case of *Wilson v. Railroad Co.*, 41 Iowa, 443, is unlike this. In that case the contract was by parol.

The fact as to the land being short forty-eight and one-half acres appears by parol, and it also appears that after the deed was executed by defendant and his wife it was handed to plaintiff, so
5 that he knew of the shortage, and the causes thereof, and with that knowledge he accepted the deed in escrow; that is, he assented to its being placed there in execution of the contract on the part of defendant. It also appears that the title of the land, when the contract was made, was in one Amelia Pulham, who is the wife of defendant. That fact did not appear in the contract, but the deed held by plaintiff, and assented to by him, and thus placed in escrow, showed the facts. We see nothing in these facts to avoid the contract, or to disturb the decree. The case is clearly distinguishable from *Luse v. Deitz*, 46 Iowa, 205, and *Zundelowitz v. Webster*, 96 Iowa, 587 (65 N. W. Rep. 835).

It is thought there is a want of mutuality of obligation that should defeat the decree, but we do not discover it. In all essential particulars, the contract as enforced by the decree has met the assent of the parties, and we do not see an equitable claim against

enforcement. There is no fraud, deception, or unfairness pleaded or claimed. The case is exceptionally strong in its facts to justify the decree, and it will stand **AFFIRMED**.

HENRY SCHAAFS, Appellant, v. ANTON WENTZ.

Promise to Pay Debt of Another: *CONSIDERATION: Collateral obligation.* An oral promise by one to pay a debt of his deceased son-in-law, if the creditor would not make trouble, is within the statute of frauds, where it does not appear that the promisor gained any personal advantage by the creditor's forbearance, and it is shown that, by reason of the insolvency of the estate, the creditor would have received nothing had he pressed his claim.

Appeal from Plymouth District Court.—**HON. JOHN F. OLIVER, Judge.**

TUESDAY, JANUARY 26 1897.

ACTION to recover of defendant the amount of a certain promissory note and book account due and owing the plaintiff from one Mathew Neisus, deceased. Plaintiff alleges that the defendant orally promised and agreed to pay the same, in consideration of the use of the property left by the decedent. The defendant denies the promise, and says that, if any was made, it was within the statute of frauds, and is not binding upon him. The case, on these issues, was tried to a jury, and at the conclusion of plaintiff's evidence the court directed a verdict for defendant. Plaintiff appeals.—*Affirmed.*

child surviving. At the time of his death he was indebted to plaintiff on the note and book account before referred to, and to various other persons, whose claims were thereafter assigned to defendant. The amount of these claims, excluding that held by plaintiff, was six hundred and seventy-four dollars and twelve cents. Three hundred and twenty dollars of this sum was for rent, and this claim was a lien upon all of the nonexempt property owned by the deceased, for it had been kept and used upon the leased premises. Defendant was a surety for the rent claim. Of the property left by the deceased, three hundred and seventy-eight dollars in value was set apart to the widow as exempt; and the whole of his estate, including the exempt property, sold at administratrix sale for six hundred and twenty-eight dollars and fifty-seven cents. Some time prior to December 15, 1893 (the exact date not appearing), Maggie Neisus, widow of Mathew Neisus, deceased, was appointed administratrix of the estate of her husband, and thereafter she sold the personal property belonging thereto, receiving in the aggregate the amount stated above. Plaintiff claims, and introduced evidence tending to show, that defendant, who is and was the father-in-law of the deceased, orally promised and agreed to pay the amount of his claim. He concedes that ordinarily such a promise would come within the statute of frauds, which provides that no evidence of a promise by one to answer for the debt of another, including promises by executors to pay the debt of their principal from their own estate, is competent unless it be in writing, and signed by the party charged, or by his lawfully authorized agent. Code, section 3663, 3664, sub-division 3. But he contends that the promise in this case was based upon an independent consideration, and was made to subserve defendant's purposes, and was therefore an original one. The

testimony relied upon to establish the promise and the claimed consideration therefor was to the effect that defendant went to plaintiff some time in October, 1893, and asked about the amount that was due and owing him from his (defendant's) son-in-law; that plaintiff gave him the amount, and defendant then said: "Don't make me any bother, and don't make any trouble. I will pay it very soon, but you will have to give me some time." Plaintiff responded by saying that he would take his word for it, and let it go as it was until later. There is also evidence to the effect that defendant said that he had some interest in the property of the deceased, and that he wanted to see how he would come out with it. There is also evidence to the effect that plaintiff turned his note and account over to an attorney for collection, and that this attorney presented them to defendant for collection, whereupon defendant said that he had all of the property belonging to Neisus in his possession; that he was going to make a sale of it, and would then pay the plaintiff's claim; that he had claims against the estate, and, if no costs were made, he would come out better. It also appears that Wentz then said to the attorney, that he had told plaintiff not to make any costs or expenses, and he would pay him. It is clear that, so far, the alleged promise of the defendant was to answer for the debt of his son-in-law. Appellant claims, however, that by reason of this promise he secured an advantage to himself, in being allowed the use of the property of deceased until the time of the

advantage to defendant in making the promise. True, he was, or might become, a creditor of the estate, but delay on the part of the plaintiff was of no advantage to him as such. It also appears that he and his son harvested and sold the grain raised upon the leased land, but this he sold and applied upon the claim for rent. This he not only had the right to do, as a surety for the rent claim, but it was also his duty to do so, for the landlord had a lien upon it superior to all other claims. Delay of the plaintiff in instituting his proceedings for the appointment of an administrator and the filing of his claim, was, under such circumstances, neither a loss to him, nor an advantage or benefit to defendant.

It is also claimed that defendant had the use of the property of the deceased from the time of his death until the appointment of the administratrix, in December, and that the delay he secured by the promise was of advantage to him. We do not think the facts disclosed justify this claim. It is true, defendant did have the possession of some of the property; but he took it at the instance and suggestion of his daughter, the widow of the deceased, and held it for her, and gained no personal advantage therefrom. The promise made by the defendant was clearly collateral, and not an original one, for it was not supported by any consideration moving to him. Not only did no advantage move to the defendant in this case, but no disadvantage resulted to plaintiff by reason of his forbearance. The setting aside of the exempt property to the widow, and payment of the claim for rent, which was a prior lien upon what remained, exhausted the entire estate, and there was nothing left for the general creditors. Had plaintiff proceeded immediately, he could have made nothing on his claim. The fact is not to be

overlooked that administration was granted in this case within five months from the death of Neisus, and that defendant gained no advantage from his promise. It is also to be remembered that, at the time the promise is said to have been made, defendant was not a creditor of the estate. He was a surety on his son-in-law's contract of lease, and would not become a creditor until he was compelled to, or did voluntarily, pay the rent reserved. With these facts in mind, it is clear that the promise was collateral, and nothing more than an agreement to make as much out of the property as possible for the benefit of all the creditors. The case of *Wilson v. Smith*, 73 Iowa, 429 (35 N. W. Rep. 506), relied upon by appellant, is not in point, for the reason that the contract in that case was of indemnity, and not a promise to answer for the debt of another.

Some other questions are discussed by counsel, but what we have said disposes of all of them. Our conclusion is that the court correctly sustained the defendant's motion, and the judgment is **AFFIRMED**.

MILLS & ALLEN V. EVANS & McCUTCHIN, et al., Appellants.

Highways: **PRESCRIPTION.** A highway by prescription is not shown

- 1 by evidence of public use for many years, if it was used during a
- 2 portion, only, of each summer, and had been closed at times, and obstructed by fences, and that when so used, it was by consent of the owner.

Piers: **DEDICATION:** *Prescription.* A pier erected by one who has

Appeal: NEEDLESS ABSTRACTS. The cost of an additional abstract
5 filed by appellee will not be allowed where it was unnecessary and
there was no sufficient cause for filing it.

GIVEN, J., took no part.

Appeal from Dickinson District Court.—HON. W. B.
QUARTON, Judge.

TUESDAY, JANUARY 26, 1897.

ACTION in equity to restrain the defendants from using a pier in Lake Okoboji, claimed by the plaintiff. There was a hearing on the merits, and a decree in favor of the plaintiff. The defendants appeal.—*Affirmed.*

L. E. Francis for appellants.

J. W. Cory for appellees.

ROBINSON, J.—I. The material facts of this case as admitted by the parties and shown by the evidence are substantially as follows: At the time this action was commenced, the plaintiff and the defendants were engaged in the business of running boats for hire on a navigable body of water known as "Lake Okoboji." The plaintiff had erected a pier, which extended from a point on the shore below high-water mark into the lake, in a northwesterly direction, a distance of seventy-four feet, but not so far as to interfere with navigation. It was ten feet wide, and had an approach eighty-four feet long and four feet wide. The pier and approach were built under a lease from W. B. Arnold, which contained the following: "Arnold's Park, April 10, 1895. For and in consideration of two hundred dollars, in hand paid, I hereby lease unto Mills & Allen, the exclusive right to erect and maintain a dock on lot 18, * * * * known as 'Arnold's Park,' and is to have the use of

said land in the interest of their steamboats, and for no other purpose whatever, for the term of two years. W. B. Arnold." Arnold was the owner of the lot when the lease was made, and the approach to the pier extended from the lot, at high-water line, across the intervening beach to the pier. Upon the lot were located a summer hotel, several cottages, and a restaurant and pavilion. A railway station is near the east boundary of the lot, and from that a driveway extends westward through the lot to the hotel, and thence westward, and then in a northwesterly direction, to the pavilion and the approach to the pier in question. From a point in the driveway near its east end a walk extends north to a pavilion and thence to Manhattan Beach dock, at which any one is permitted to land. For many years baggage had been hauled from the station through this lot or park, and unloaded at different piers, including one which had been maintained near the one in controversy. The one so maintained was used by all persons who desired to use it, until the year 1895, when it was purchased by the plaintiff, and then removed, and the one in suit was built two or three rods from its site. The plaintiff claims the exclusive right to use the new pier, and shows that, until they were enjoined, the defendants used it for their own benefit, to solicit and receive passengers, and to land them, to the injury of the plaintiff. A temporary injunction, restraining the defendants from using the pier, was issued. The defendants, the Lawrence Brothers, have filed a disclaimer. The other defendants insist that the pier is for the public, and that they are entitled to use it with the plaintiff. The claim thus made is based upon several grounds, two of which are stated by the appellants, as follows: "(1) That the said dock has been held us a public dock for years; that its situation is such as renders necessary the

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maintenance of a public dock at that point, and that at the time of securing the temporary injunction herein, and ever since that time, it has been used as a public dock, and held out as one. (2) That a road established by prescription runs across the land owned by said Arnold, to the lake shore, reaching it immediately in front of the dock in question; that said dock is located below high-water mark, and the landing thereof is below high-water mark, and immediately out from the terminus of said road." It is also insisted that the lease given by Arnold did not give to the plaintiff any right to the shore below the high-water line.

It is admitted that the pier does not commence at any regularly established public highway, but it is insisted that it does commence in one established by prescription. The road was traveled regularly

2 only during a portion of each summer, and then by consent of Arnold. At other times the road had been closed, and on several occasions within five or six years of the commencement of this action, had been obstructed by fences. We conclude that the evidence fails to show that the road had been made a public highway by dedication or prescription. The park or lot is public to the extent that it contains an hotel which is kept open for guests during the summer months, and when it is open the public may use the road and other ways through the park by the consent of the owner. The park is bounded on the northwest by the lake, from which it is not separated by any highway, or other public grounds, and the lease of Arnold transferred to the plaintiff all the right to build and maintain a pier which he could have exercised as the owner of land bounded by a navigable lake. It is the law of

8 this state that a riparian owner has "the right to construct, below high-water mark, bridges, piers and landing-places," if he conforms to the

regulations of the state, and does not interfere with the right of navigation. *Musser v. Hershey*, 42 Iowa, 361; *Renwick v. Railroad Co.*, 49 Iowa, 670. This is the general rule. *Hanford v. Railroad Co.*, 43 Minn. 112 (42 N. W. Rep. 296), and (44 N. W. Rep. 1144), and cases therein cited; *Yates v. Milwaukee*, 10 Wallace, 503; 29 Am. & Eng. Enc. Law, 68. The title of the owner of land bounded by a lake, extends to the natural shore. *Noyes v. Collins*, 92 Iowa, 566 (61 N. W. Rep. 250); *Diedrich v. Railway Co.*, 42 Wis. 262. The right of the owners of land upon navigable lakes to erect piers, docks, and other works necessary to a proper enjoyment of their property, which do not interfere with the paramount right of the public to navigate the water, is substantially the same as of those whose lands are upon navigable rivers. See *Hanford v. Railroad Co.*, 43 Minn. 112 (42 N. W. Rep. 596), and (44 N. W. Rep. 1144); *Land Co. v. Emerson*, 38 Minn. 406 (38 N. W. Rep. 200); *Dutton v. Strong*, 1 Black, 31; Angell, Water Courses, section 42. The plaintiff therefore acquired the right to erect and maintain the pier in question for the legitimate purposes of its business, and, if Arnold could have maintained it as a private dock, the plaintiff may do the same. There was no attempt to grant the right to erect a pier excepting as it was connected with and dependent upon the lot.

The evidence does not show that the public has acquired any right to use the pier. The mails are not carried over it by any government agent. Manhattan Beach pier is near the northeast corner of the park, and nearer to the railway station than is the
4 pier in question. Some of the defendants have a pier near the west side of the park. The fact that the plaintiff erected its pier near the site of one

which had been used by all who desired to use it, does not make the one so erected a public pier. The plaintiff, for a consideration, gave to the owners of some of the boats, the privilege of using the pier, and offered to permit some of the defendants to use it upon their complying with certain conditions; but they refused the offer. The pier was not sufficiently large to accommodate the boats of the plaintiff, and also those of the defendants, and some of the latter proposed to build an extension to the pier, but were not permitted to do so. We do not find that the defendants have any right to extend the pier, or to use it. That it would be convenient and profitable for them to do so, is no doubt true, and, if they had that right, their patrons would probably derive a benefit from it. But the plaintiff built the pier, and has the exclusive right to maintain and use it. It is true that a pier, or other landing place, may sometimes be impressed with a public character, although owned by a private individual. In this case it may well be said that persons desiring to take, or leave boats which are permitted to land at the pier in question, are invited to use it, and to that extent it is public. But there is nothing in this case, no controlling consideration of public welfare, which requires us to hold that boats used in competition with those of its owner, should be permitted to use it. The plaintiff, after having purchased the right to do so, constructed the pier for its private advantage; and, so long as the rights of the public to use the lake are not interfered with, should be permitted to use it for the purpose for which it was intended. The decree of the district court protected the plaintiff in such use.

II. The appellants complain of an additional abstract filed by the appellee as unnecessary. We

find that the larger part of it was prepared without sufficient cause, and the appellee will be allowed
 5 costs on account of it to the amount of six dollars only. The decree of the district court is
 AFFIRMED.

GIVEN, J., took no part.

THE CAPITAL SAVINGS BANK & TRUST COMPANY, Appel-
 lant, v. F. C. SWAN.

Notice to Officers of Corporations: SETTING ASIDE PERSONAL JUDG-

1 **MENT AGAINST OFFICER.** It is not an abuse of discretion to open a default judgment against S. on a note intended to be that of a corporation of which he was secretary, but which, on its face, through the omission of the word "by" before his name, was the joint note of himself and the corporation, though notice of the action was served on him as well as on the corporation; he having turned it over to the president, not noticing that a personal claim was made on him, and supposing that it related only to the corporation.

Notice to Purchaser of Note: SIGNATURE BY OFFICER OF CORPORATION.

2 A purchaser of a note signed in the name of a corporation by "W. E. H., president, F. C. S., secretary and treasurer" is sufficient to put a purchaser of a note on inquiry as to whether the secretary intended to personally bind himself, thereon.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, JANUARY 27, 1897.

ACTION in equity to recover the amount due on a promissory note, and for the foreclosure of a mortgage given to secure its payment. Judgment was rendered by default against the defendant, F. C. Swan. The judgment and default were set aside on his application, and he filed an answer, to which the plaintiff demurred, and the demurrer was overruled. The plaintiff elected to stand upon its demurrer, and

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judgment was rendered in favor of Swan for costs, and the plaintiff appeals.—*Affirmed.*

Lohr, Gardiner & Lohr for appellant.

Geo. M. Pardoe for appellee.

ROBINSON, J.—The plaintiff is the owner of a promissory note, of which the following is a copy: “\$800.00. Sioux City, Iowa, November 10th, 1891.

On or before five years after date, we promise to pay to the order of W. E. Higman eight hundred dollars at our office in Sioux City, value received, with interest at eight per cent. after maturity. If this note is not paid at maturity, the undersigned agree to pay reasonable expenses of collection, including attorney’s fees. Merchants Loan & Trust Company, Sioux City, Iowa, by W. E. Higman, President. F. C. Swan, Sec’y & Treas.” The mortgage given to secure this note was on a lot in Sioux City, and was signed in substantially the same manner, and by the same persons, as was the note. The mortgage was duly recorded. In November, 1892, the payee of the note transferred it to the plaintiff by an indorsement thereon in words as follows: “Protest waived. W. E. Higman,”—and at the same time assigned to the plaintiff the mortgage. That provided that, in case of default in the payment of interest due on the note, the whole indebtedness should become due. Interest due on the tenth day of November, 1893 not having been paid, this action was commenced to recover the entire amount of the note, and to foreclose the mortgage. Notice of the action was served on the Merchants Loan & Trust Company, on Higman, and on Swan. The notice to Swan was served on the third day of August, 1894, and contained the following: “You are hereby notified that on or before the 17th day of

August, 1894, a petition will be filed by said plaintiff, * * * claiming of you the sum of nine hundred ten and 10-100 dollars * * * on your promissory note in writing for \$800.00, dated Nov. 10th, 1891, and due Nov. 10th, 1896, said note having become due because of default in payment of interest, * * * and that, unless you appear thereto and defend before noon of the second day of the next term of said court, * * * commencing on Monday, the 27th day of August, 1894, default will be entered against you, and judgment rendered thereon." The petition was on file in due time. On the thirty-first day of August, 1894, Swan having failed to appear, his default was entered, and judgment rendered against him for the amount claimed in the petition. On the eighth day of October, 1894, he filed a motion to set aside the judgment and default, supported by the affidavits of himself and Higman, and accompanied by an answer to the petition. The affidavits show the following facts: When Swan was made secretary and treasurer of the Merchants Loan & Trust Company, he was an employe of Higman, who was president of the company. His duties as said employe had no connection with the company, except to require him to sign papers when directed to do so by the proper officers, and he did not receive any salary as secretary and treasurer. It was always understood between himself and Higman that the latter should always attend to all the business of the company, and that Swan need not devote any time or attention to it. Numerous papers in relation to the company had been served on Swan before the original notice in this case was served, and had been attended to by Higman. When the note and mortgage in suit was signed, Swan was but

not intend to make himself personally responsible for anything. He supposed that the word "by," placed before Higman's name, referred to him as well as to Higman, and had no personal interest in the transaction. When the notice was served on him, he saw that it related to the company, and, supposing that Higman would attend to the matter, did not give it any further thought. He was busy at the time, and did not notice that a personal claim was made upon him. Higman states that he wrote the word "by" before his signature, and intended that it should refer to the secretary and treasurer as well as to himself. The mortgage recites that it is to secure a promissory note of the Merchants Loan & Trust Company. The youth of Swan, and the fact that he was not acquainted with legal business, would not, alone, excuse his failure to appear to the action at the appointed time and protect his interests. But it is clear, that he had no personal interest in the transaction in which the note and mortgage were given, and that neither he, nor the payee of the note and beneficiary of the mortgage, had any intention to bind him personally by the note and mortgage. The failure to indicate clearly that Swan signed the instruments only as an officer, to obligate the company, was the result of a mutual mistake. Therefore, the original notice, in fact, related only to the liability of the company, and the duties of Swan and the course of practice which Higman theretofore followed in similar cases, were of such a character that Swan may naturally have concluded, without a careful inspection of the papers, that there was no occasion for him to give any further attention to the matter, to protect himself from a liability which he did not know existed. Although the showing to excuse the default is not wholly satisfactory, yet it is the policy of the law to dispose of cases upon their

merits, and a large discretion is vested in the district courts in the matter of granting new trials. *McQuade v. Railway Co.*, 78 Iowa, 688 (42 N. W. Rep. 520), and (43 N. W. Rep. 615); *Marsh v. Colony*, 36 Iowa, 603; *McNulty v. Everett*, 17 Iowa, 581; *Rogers v. Cummings*, 11 Iowa, 459. We cannot say that the district court abused its discretion in setting aside the judgment and default, and granting a new trial in this case.

II. It is next urged that the district court erred in overruling the demurrer to the answer. That sets out the facts in regard to the signing of the note and mortgage which were recited in the affidavits, and avers that, if the note binds Swan individually, it was so made in consequence of a mutual mistake on his part and on the part of the payee. A reformation of the note by prefixing the words "and by" to the signature of Swan is asked. It may be conceded, for the purposes of this appeal, that the form of Swan's signature is such that, according to the rule adopted by this court in numerous cases, it bound him personally, and not the company. See *Wing v. Glick*, 56 Iowa, 473 (9 N. W. Rep. 384); *Heffner v. Brownell*, 70 Iowa, 591 (31 N. W. Rep. 947); *Id.*, 75 Iowa, 341 (39 N. W. Rep. 640); *McCandless v. Canning Co.*, 78 Iowa, 161 (42 N. W. Rep. 635); *Lee v. Percival*, 85 Iowa, 639 (52 N. W. Rep. 543); *Day v. Ramsdell*, 90 Iowa, 731 (52 N. W. Rep. 208), and (57 N. W. Rep. 630); *Water Power Co. v. Ramsdell*, 90 Iowa, 747 (52 N. W. Rep. 209), and (57 N. W. Rep. 631); *Matthews v. Mattress Co.*, 87 Iowa, 246 (54 N. W. Rep. 225). But a court of equity will, in a proper case, correct a mistake in such a signature. *Lee v. Percival* and *Matthews v. Mattress Co.*, *supra*. And we are of the opinion that the facts shown by the answer in this case are sufficient to authorize a reformation of the note, as between the defendant and the payee. It is said, however, that the plaintiff is an innocent purchaser of the

note before maturity, for value, and, therefore, that the defendant is not entitled to a reformation as against it. If the plaintiff took the note without actual knowledge of the alleged mistake, and without notice of any fact which would have been sufficient to put a reasonably prudent person upon inquiry, it may be conceded

that Swan is not entitled to a reformation of the
2 note. But we are of the opinion that the plaintiff had notice of such a fact when the note was purchased. The form of the signature to the note is unusual, and well calculated to suggest the fact that the defendant may have intended to sign the note in an official capacity only. The name of the company is affixed at length, as by the president of the company. That is followed by the name of the defendant, to which are attached words which indicate his official title. It is true, those words, as used, merely describe the person, without making the signature to which they are appended official; yet such words are most commonly used, with signatures, to indicate an official act; and there is nothing in the note in suit which makes the words in question at all necessary, or even appropriate, to indicate a mere personal liability. Words of a like character are so frequently used, with a signature, to designate an official act, and are so rarely used in that manner for any other purpose, that when they are attached to a signature they are well calculated to suggest that the signature was intended to be official, and not merely to describe the signer. See *Metcalf v. Williams*, 104 U. S. 93.

We conclude that the facts set out in the answer entitle the defendant to a reformation of the note in suit, and that the demurrer was properly overruled. The judgment of the district court is therefore **AFFIRMED**.

JOHN WOOD AND H. G. CURTIS, Appellants, v. A. M. DUVAL, Defendant, SAM HOFFMAN, JR., Intervener.

Landlord's Lien: MORTGAGE—PRIORITY: Estoppel. Landlords, who had a chattel mortgage on their tenant's property, wrote H., who
 1 had been asked to make a loan to the tenant, that they would release the mortgage, without mentioning a landlord's lien held by them. H. understood they intended to release the lien, and made the loan secured by mortgage, believing, because of the promise to release, his would be the first lien; and they sent the release, understanding that because of it, he would make the loan, and that his intention was to have first lien. *H id*, that H.'s loan was prior to the landlord's lien.

Assignment: MORTGAGE PROCEEDS. Where mortgaged chattels are sold by the mortgagor at public sale, and by agreement between
 2 him and mortgagee, the notes taken at the sale are, at the time, put in the hands of the clerk of the sale for the mortgagee, it amounts to an assignment of the notes to the latter.

Appeal from Cass District Court.—HON. W. R. GREEN, Judge.

WEDNESDAY, JANUARY 27, 1897.

ACTION for the recovery of specific personal property. Judgment for intervener, and the plaintiffs appealed.—*Affirmed*.

Curtis & Follett for appellants.

J. B. Rockafellow for appellee.

GRANGER, J.—I. The subject of the action is some promissory notes and money, the proceeds of a sale of personal property. In March, 1894, the plaintiffs leased to one Havens a farm for an agreed rental of five hundred and twenty dollars. Havens took onto the premises certain property, on which, by operation of law, the plaintiffs had a landlord's lien. In May,

thereafter, Havens executed to the intervener, Hoffman, a mortgage on the property to secure him for a loan of three hundred dollars. In January, 1895, Havens sold the mortgaged property at public sale, and the notes and money were delivered to the defendant Duval, who was a clerk at the sale. This action is for their possession, and the contention is between the plaintiffs, because of their landlord's lien, and the intervener, because of his mortgage lien. Some other facts, pertinent to the different claims, will be noticed hereafter.

II. Besides the landlord's lien in favor of plaintiffs, they held a chattel mortgage on the property in question to secure some one hundred and eighty-four dollars and five cents, and, as Hoffman would
1 not make a loan to Havens without a release of that mortgage, Havens saw plaintiffs, and they addressed to Hoffman the following: "Atlantic, Iowa, May 19, 1894. To Sam Hoffman, Jr.: We will release our mortgage [chattel] against Z. D. Havens promptly upon receipt of the amount of same, to-wit: one hundred and seventy-four dollars and seventy cents and interest on the same to date, from April 4, 1894, and the sum of nine dollars,—making, in all, the sum of one hundred and eighty-four dollars and five cents. Upon receipt of said sum, we will release immediately. Date of mortgage, April 16, 1894. Curtis & Wood, per Curtis." After the receipt of this paper, Hoffman loaned to Havens three hundred dollars, taking his note, secured by a chattel mortgage on the property. Of the amount loaned to Havens, Hoffman paid to plaintiffs a sufficient amount to satisfy their mortgage, and it was released in pursuance of the agreement. After the public sale, Havens, in writing, assigned the notes and money to Hoffman. From the evidence the district court had found that the public sale took place in pursuance of an

understanding between Havens and Hoffman that Duval should be the clerk at the sale, and that the notes and money should be delivered to Duval for Hoffman, to the amount of his claim, and that they were so delivered. There is also a claim by appellants that they also had an agreement that Duval should receive the notes and turn them over to them on their claim. As the judgment is for intervener, and it is a law case, we are to assume facts, having support in the evidence, that will sustain the judgment. Of course, the delivery of the notes to Duval for Hoffman, in pursuance of the agreement, would not divest plaintiffs of their lien as landlords, for theirs was a prior lien, of which, we understand, Hoffman and all others must take notice. *Richardson v. Petersen*, 58 Iowa, 724 (13 N. W. Rep. 63). The intervener pleads the facts showing a waiver on their part of their landlord's lien, because of the written promise to release the mortgage. The question of fact here is the doubtful one in the case. After reading the record, one cannot easily escape the conviction that Hoffman made the loan believing, because of the promise to release by plaintiffs, that his would be the first lien. It is true the writing promising to release, specifies the mortgage only. That plaintiffs knew that Hoffman intended to make a loan because of the release there is no doubt. The district court could have properly found, if not that plaintiffs intended to waive the other lien, that they had reason to believe that Hoffman so understood, and in that event they would be bound as if they had so intended. Code, section 3652. The writing, if acted upon by Hoffman, made an agreement, so as to bring it within the meaning of the section. It is by no means a forced conclusion from the record to say that plaintiffs made and sent to Hoffman the promise to release their mortgage, understanding that, because of it, he would make the loan,

and his intention was to have a first lien. In view of all the facts, including the value of the property mortgaged, the amount loaned, and the rental, such a conclusion has support in the evidence. If so, they ought not now to be permitted to profit by having their landlord's lien made better by the satisfaction of their mortgage, and leave Hoffman to lose by the transaction. The amount realized from the sale of the property in controversy is two hundred and fifty-five dollars and eighty-two cents, which, in any view of the case, shows the value of the property could not have been sufficient to be security for the rental and the loan by Hoffman.

In the judgment entry is a finding that Hoffman is the "absolute owner of the notes by assignment by Z. D. Havens, the payee in the notes." There is in the record a written assignment, and it is uncertain when it was made, and it is urged by appellants that it was after the commencement of this suit, so as to be of no force in the suit. It does not appear that the written assignment is the one relied on by
2 the court. As we have said, the court could have found that the notes were placed in Duval's hands for Hoffman at the time of the sale. If so, that, of itself, would amount to an assignment. To assign, in conveyancing, is to make or set over to another. An assignment is the act by which one person transfers to another. Black, Law Dict.; Burrill, Assignments, 1. As applied to personal estate, the term has a double meaning, including the *act* as well as the *instrument* by which the transfer is effected. Id. 2. The record would clearly sustain a finding that, as between Havens and Hoffman, the property was transferred at the time of the sale. There is a complaint that the judgment is for too much. There may be a slight discrepancy, but, if any, it is so small as not to justify a reversal. The court only

gave judgment for intervener for the notes. The money was not included, and it remains in the hands of plaintiffs without any judgment specifying it. Under the judgment it does not go to intervener, and of that plaintiffs cannot well complain. There is no ground for a division of the costs because of that, or for any other reason. The judgment is **AFFIRMED**.

ERNEST FORDISCH V. THE CHICAGO & NORTH-WESTERN RAILWAY COMPANY, Appellant.

Misconduct of Juror: NEW TRIAL NOT GRANTED. In the absence of
 1 a showing that prejudice resulted, a new trial should not be granted plaintiff, because the jurors, while viewing the premises involved, asked plaintiff questions about the case, which questions amounted, simply, to a speaking aloud of the juror's thoughts, no reply being made to such questions, and no one talking to the jurors.

KNOWLEDGE OF MISCONDUCT BEFORE CLOSE OF TRIAL: *Estoppel*. A
 2 party, who, knowing before the conclusion of the trial, of misconduct of the jury, proceeds without objection, cannot have a new trial, by reason thereof.

Appeal from Pottawattamie District Court.—HON. WALTER I. SMITH, Judge.

WEDNESDAY, JANUARY 27, 1897.

APPEAL from an order of the district court sustaining plaintiff's motion to set aside the verdict rendered in favor of the defendant, and granting a new trial.—*Reversed*.

Hubbard & Dawley for appellant.

Flickinger Bros. for appellee.

to a stock of tobacco, cigars, and other articles, stored in the cellar of plaintiff's residence, in the city of Council Bluffs, Iowa. The charge is that the bridge of the defendant company across Indian Creek, in Council Bluffs, was so negligently constructed that it did not furnish sufficient waterway, thereby causing said overflow. The evidence tended to show that the creek flowed in an artificial channel, constructed many years ago by the city of Council Bluffs. In constructing the channel, the earth thrown out was left at the sides of the channel, forming an embankment on each side, above the natural level of the adjacent ground. On the night of June 2, 1890, an extraordinary rainfall occurred, and much rubbish, including planks and cordwood, was carried down the stream, and against this bridge. Being thus obstructed, the water broke through the embankment, and spread over the flat, filling plaintiff's cellar. The jury found for the defendant. Two days before the trial was concluded, the jury, with the consent of the parties, viewed the premises. After the verdict, plaintiff filed his affidavit in support of his motion for a new trial, in which he says: "That at such visit one of the jurymen, whose name I am unable to give, asked me about the sidewalk in front of the schoolhouse, and when it had been graded up, and whether or not my sidewalk was of same height it was at the time of the flood. That he also said that he had examined the foundation of the house, and that what I had sworn to was not true, for the foundation was higher than I had actually stated, and also that the cellar wall was higher than I had stated. That one of the jurymen asked me to go down cellar, and show him how high the water had risen in it. That the bailiff told me not to talk to the jurors, and I refused to go down with him into the cellar, or hold any conversation with him."

The plaintiff's wife, Lizzie Foedisch, also made affidavit: "That one of the jurors came to me, and asked me where the hole was, through which the water had come into the cellar. I told him that we had had the hole bricked up. After they had gone into the cellar, one of the jurors, whose name is unknown to me, said that the foundation was not as high as we had sworn to, and that the cellar was higher up than we had sworn to; and that we had not, when under oath, sworn correctly as to the height of the foundation and the cellar." Affiant further states that members of the jury, whose names are unknown to her, made various inquiries as to the grade of the lot, and whether or not its condition now was the same as at the time of the flood. The court set aside the verdict on account of this showing, and the defendant appeals.

Code, section 2837, provides for the granting of a new trial "on the application of the party aggrieved for the following causes, affecting materially the substantial rights of such party: * * * (2) Misconduct of the jury." It is urged that the court erred in granting the new trial. It will be observed that neither of the affiants said anything to the jurors who spoke to them, except Mrs. Foedisch, who told the juror the hole had been bricked up. It was improper for these jurors to talk to these parties, but we do not discover how the substantial rights of the plaintiff were or could have been affected thereby. No prejudice could arise by reason of Mrs. Foedisch's statement. The most that can be said is that the

questions, they were not advised of anything by reason of such conversation which they did not already know, and hence it is impossible that the plaintiffs could have been prejudiced thereby. A verdict will not be set aside merely because a jury member has, in violation of his sworn duty, talked to persons about the case. It must appear that the misconduct was such as to materially affect the substantial rights of the complaining party. *Brant v. City of Lyons*, 60 Iowa, 172 (14 N. W. Rep. 227); *Ridenour v. City of Clarinda*, 65 Iowa, 465 (21 N. W. Rep. 779); *McCash v. City of Burlington*, 72 Iowa, 26 (33 N. W. Rep. 346); *Stockwell v. Railroad Co.*, 43 Iowa, 470; *Fulliam v. City of Muscatine*, 70 Iowa, 436 (30 N. W. Rep. 861); *Truman v. Bishop*, 83 Iowa, 697 (50 N. W. Rep. 278); *State v. Woodson* 41 Iowa, 425; *Bowman v. Manufacturing Co.*, 96 Iowa, 188 (64 N. W. Rep. 777). In this case no prejudice is shown because of the misconduct, nor does it appear that there is any ground for presuming prejudice.

II. Even if the conduct of the jurors complained of could be said to be prejudicial to plaintiff, he is in no situation to now avail himself of it. It appears without dispute that the alleged misconduct
2 was known to plaintiff a day or two before the trial was concluded. He took no steps to call it to the attention of the court. He seems to have been willing to go on with the trial, taking his chances of a favorable verdict, making no objection until after he is defeated. Knowing, as he did, of the misconduct, and proceeding thereafter with the trial without objection, he should be held to have waived his right to insist upon it. *Stewart v. Ewbank*, 3 Iowa, 191; *Riley v. Monohan*, 26 Iowa, 507; *Mehan v. Railroad Co.*, 55 Iowa, 305 (7 N. W. Rep. 613); *Riech v. Bolch*, 68 Iowa, 526 (27 N. W. Rep. 507); *Koester v. City of*

Ottumwa, 34 Iowa, 41. This is the rule in other jurisdictions. *Bourke v. James*, 4 Mich. 336; *Hallock v. County of Franklin*, 2 Metcalf (Mass.) 560; *Fox v. Hazelton*, 10 Pick. 275; *Easley v. Railway Co.* (Mo. Sup.) 20 S. W. Rep. 1073; *Wynn v. Railway Co.* (Ga.) 17 S. E. Rep. 649; *Fessenden v. Sager*, 53 Me. 531; *Scott v. Waldeck*, 11 Neb. 525 (10 N. W. Rep. 409); *Id.* (Neb.) 10 N. W. Rep. 413; *Stampofski v. Steffens*, 79 Ill. 303. In any event, then, the motion for a new trial should not have been sustained. For this error the judgment below is REVERSED.

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GEORGE W. FERGUSON v. THE CHICAGO, MILWAUKEE
& ST. PAUL RAILWAY COMPANY, Appellant.

Negligence: DUTY OF CREW. Employees in charge of an engine have the right to assume that a switchman who was attempting to
8 mount on the front foot-board for the purpose of making a switch, has succeeded in doing so, where he is hidden from their view by the boiler; and are not required to stop the engine to ascertain whether he has done so.

CONTRIBUTORY NEGLIGENCE. A switchman who voluntarily steps into
1 the middle of a track in front of an engine which he intends to board, instead of getting on at the side, which he can do with
4 safety, is guilty of such contributory negligence as will prevent a recovery for an injury caused by his slipping and falling in front of the engine.

Hearing Outcry: JURY QUESTION. Plaintiff, a switchman on defendant's railroad, fell while attempting to climb upon the foot-board
2 of a slowly moving switch engine, but caught hold of the foot-board by which he was dragged one hundred and sixty-seven feet, and his foot was crushed. During this time, he continually cried out for the engineer to stop. A person on the foot-board near the center, though standing, would be shut off from the view of those on the engine. The bell was ringing, and there were four persons on the engine, all of whom testified that they heard no outcry, but stopped the train at once, on being signaled by a bystander. *Held*, the fact that plaintiff's outcry was heard by persons standing at a distance from the engine, would not justify holding that it was heard by those on the engine, and that there was no evidence of negligence on the part of any of the employees, which would render the defendant liable for the injury.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

WENDESDAY, JANUARY 27, 1897.

ACTION at law to recover damages for personal injuries sustained by plaintiff in being run over by a

switch engine in defendant's yards, in the city of Sioux City. Trial to a jury. Verdict and judgment for the plaintiff, and the defendant appeals.—*Reversed.*

H. H. Field and Taylor, Shull & Farnsworth for appellant.

Argo, McDuffie & Argo for appellee.

DEEMER, J.—At the time the plaintiff received his injuries, which was on December 21, 1892, he was in the employ of the defendant as a switchman, in its yards at Sioux City, Iowa. He was thirty-two years of age, and had been engaged in railroading, in the capacity of brakeman, conductor, and switchman, for eight or nine years. He had been employed in switching for about two years prior to the accident, and for the defendant, about nineteen months prior thereto. The defendant's yards extend in an easterly and westerly direction through the entire city of Sioux City, and were known as the upper and lower yards. At the time plaintiff received his injury, he was working in the upper yards, which are in the vicinity of the passenger depot of the railway company. At the time of the accident the company was using an ordinary road engine for switching purposes. It had, however, taken the pilot off, and had placed handrails and footboards at the forward and rear ends of the engine. A few minutes before 10 o'clock A. M. of the day in question, the switch-engine crew received orders to go west on defendant's main line of road, which runs into Sioux City from South Dakota, to help a freight train into the city. A passenger train was due from the west, however, at about 10 o'clock, and the switch engine and its crew were compelled to await its arrival before proceeding onto the main

track. During the interval, the switch engine stood on what is known as the "Joint Track," north and opposite of the passenger depot, and east of what is called "Douglass Street." The engineer and fireman were on the switch engine, and plaintiff and a fellow switchman, named Rossiter, were loitering around the express office, at the foot of Douglass street, all awaiting the arrival of the passenger train. The passenger train came in on the main line track, which is immediately south of the joint track, and stopped just east of the Douglass street crossing. Thereupon the switch engine started to go westerly on the joint track, through the switches, and out on the main line. As the engine started, the bell was sounded, and it continued to ring until after the accident occurred. Plaintiff, whose duty it was to turn the switches so that the engine might pass onto the main track, started from the express office in a northwesterly direction, and ran towards the side-track

1 on which the switch engine was moving. He stepped over between the rails of the track on which the switch engine was running, some thirty or forty feet from where it started, and attempted to jump onto the front foot-board. In this he did not succeed, but slipped and fell on the track, and the foot-board of the engine passed over him. As it passed over him, plaintiff caught the foot-board, and was dragged for more than one hundred feet, when his right foot was caught by one of the wheels, and so injured that amputation was necessary. At the time plaintiff received his injuries, the engine was running at a speed of from four to six miles an hour. Plaintiff claims that as soon as he fell he commenced to call out in a loud voice, but that the engine was not stopped until after he received his injuries. Three charges of negligence are made in the petition: *First*. In permitting the foot-board of the engine to become

covered with ice and snow. *Second.* Failure on the part of the persons operating the switch engine to keep a proper watch and lookout for plaintiff, and in not listening for his signals, or stopping the engine after he had signaled to have the same stopped. *Third.* "Using an engine not properly constructed, and not intended for switching, for the reason that the boiler shut off the view of the engineer of persons on the foot-board of said engine; that the front of the boiler projected over the foot-board; that the wheels of the engine were placed close behind the foot-board, and the engine was not provided with a sufficient railing to enable plaintiff to get upon the foot-board, or to ride thereon, with safety. It was also alleged that after the plaintiff had fallen from the foot-board, he was carelessly and negligently pushed along the track in front of the engine; that during all the time he was so being pushed, he cried out, and did everything in his power to attract the attention of the persons in charge of the engine, but they failed and refused to stop said engine, by reason whereof he was run over and injured." The trial court, in its instructions to the jury, eliminated all charges of negligence with reference to the construction and condition of the engine and foot-board, and submitted the case solely upon the issue of negligence of persons in charge of the engine, in failing to keep a proper lookout, or in failing to hear the plaintiff's outcries, or to stop the engine after he had fallen upon the track. At the close of the evidence, defendant moved for a verdict in its favor, for the reasons:—*First*, that no negligence on the part of the defendant or its employes had been shown; and, *second*, that there was such contributory negligence on the part of the plaintiff as would defeat a recovery. This motion was overruled, and defendant then asked instructions to the effect that under the facts disclosed

by the evidence, there was no negligence, and plaintiff could not recover. These instructions were refused, and exceptions taken.

This appeal presents but two questions, and these relate to the sufficiency of the evidence. Appellant insists that the evidence is insufficient to show negligence of the persons in charge of the engine, either in failing to keep a proper lookout, or in not hearing plaintiff's outcries, or in not stopping the engine after he had fallen upon the track. And it further insists that plaintiff was guilty of such contributory negligence as bars him of recovery. Appellee claims, in argument, that the defendant's employes were guilty of negligence in not seeing that plaintiff had fallen upon the track in front of the engine, and in not stopping the train in time to have prevented plaintiff from being injured.

The undisputed evidence is that the plaintiff was pushed along the track a distance of one hundred and sixty-seven feet before he was injured, and there is testimony to the effect that, from the time he
2 fell upon the track until the wheel passed over his foot, he called out continuously, and as loud as he could, to the engineer and fireman to stop the engine. But there is no direct evidence that he was heard by these employes until too late to avert the injury. Appellee says that the engineer and fireman heard his cries, or that if they did not, they were negligent in not hearing them. The evidence shows that it was a cold morning, with the wind blowing quite strong from the north. The curtains were down on the gangway of the cab, on both sides; the bell of the engine was ringing; the passenger train had just arrived; and there was more or less noise there from the wagons and vehicles, and other noises incident to
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the arrival and departure of trains. A witness who was on his way to the freight house, and who was about one hundred and sixty feet from plaintiff when he was injured, heard his outcries, and says it was a general outcry from the first, that he distinctly heard it, and that it attracted his attention. Another witness, who was a little distance west of the express office, at the foot of Douglass street, saw Ferguson as he passed him, going to the engine; saw him go to the track that the moving engine was on, and watched him as he stood there, until the engine came up and he attempted to get onto the footboard; saw him slip and fall, and, to quote his own words: "As soon as he slipped I gave the signal to stop. There was some wind blowing. I succeeded in attracting the attention of the fireman. As soon as they got my signals they stopped pretty quick. The bell of the engine was ringing at the time. There was more or less noise around there from wagons, etc. I kept giving the signal, and hollered several times, until I got their attention; hollered loud, and made the ordinary signal for stopping. I was on the fireman's side of the engine, about twenty-five feet from the track. They, apparently, did not hear me. As soon as I attracted their attention they stopped. I did not hear Ferguson call but once. I heard him holler once when he first fell." At the time the accident occurred, two persons were in the cab of the engine besides the fireman and engineer. One of these was the fireman of the switching crew, and the other was the general yard master. No question is made but that these men were properly there, nor is there any serious claim that they in any manner interfered with the fireman or the engineer in the performance of their duties. The engineer did not see plaintiff until after the engine was stopped, and it is doubtful, from the evidence, if he could have seen him at any time. The

yard master saw Ferguson as he was going to the front end to get on, but as he went onto the track, he passed out of sight of those in the engine, because the front end of the boiler interfered with the view. The fireman knew nothing of any mishap until he saw the witness, who was at the express office, making an outcry and giving signals, and he immediately gave the engineer a signal to stop, which was done as soon as possible after the fireman had given the word. He says that he supposed that the plaintiff was on the front end of the engine, and that he did not know what the trouble was until after the engine stopped. The switching-crew foreman did not know that anything was wrong until he heard some one "hollering" outside. This outcry he heard but once, and he immediately jumped off the engine and ran towards the forward end, but the engine stopped before he reached the head end. He says that the fireman told the engineer to stop immediately after he heard the outcry from some one on the outside. Each and all of these witnesses say that they heard no outcry except the one which the fireman recognized, and by reason of which he gave the signal to stop. And there is no evidence contradictory to this, unless we are prepared to say that the jury was justified in finding that they did hear, from the fact that two witnesses who saw the accident from the outside heard the plaintiff's outcries. We do not think that such an inference is a fair one. The situations of the persons in the engine was so different from that of the bystanders, that the fact that they saw plaintiff fall, and heard his outcries, does not show that the persons who were in the engine did. Nor do such circumstance tend to overcome the positive evidence of these men who were in the engine. As said in the case of *Ford v. Railroad Co.*, 69 Iowa, 627 (21 N. W. Rep. 587 and 29 N. W. Rep. 755): "A circumstance

entirely consistent with direct evidence, does not raise an inference in rebuttal of it. And a verdict based upon such circumstances, and in contravention of direct evidence, cannot be sustained." None of the persons on the engine knew, or had reason to believe, that plaintiff was not upon the foot-board at the front end of the engine, until they heard the outcries of the bystanders. As he passed onto the side-track, in front of the engine, he disappeared from the sight
3 of the men who were on the engine. The front end of the boiler entirely obscured him from view. The men who were handling the engine had the right to assume that he had succeeded in mounting the foot-board, and were not bound to stop the engine to ascertain whether or not he had done so. The engine was moving at the ordinary rate of speed, and no claim is made that there was any carelessness in this respect. As soon as any one on the engine heard an alarm, he immediately gave the signal to the engineer to stop, and this signal was promptly obeyed, and the engine was brought to a full stop within a few feet. We do not think there was any negligence on the part of the defendant's employes, and are constrained to hold that the defendant's motion for a verdict should have been sustained, or his requests for instructions granted.

II. If there had been sufficient evidence to take the case to the jury on the issue of negligence, still we think plaintiff could not recover, because of his want
4 of care, contributing to the injuries complained of. The foot-board and hand-rail at the forward end of the engine extended a foot beyond either rail, and there was a hand-rail and a foot-board at the rear of the engine. The plaintiff could, with safety, have mounted the forward foot-board, without placing

came to where he was, and then to have stepped onto the foot-board. This he could have done without the least danger from accident should he have missed his hold, or fallen in the attempt to board the engine. He voluntarily took the most dangerous course, when others comparatively safe were at hand, and, in so doing, placed himself in a position to prevent recovery. We do not mean to be understood as holding that if the persons in charge of the engine failed to exercise ordinary care in stopping it after they knew that plaintiff had missed his hold, or had slipped and fallen, that plaintiff's contributory negligence would prevent his recovery. Such is not the case we are now considering. We have in mind a case where the engineer or fireman, or both, failed to keep a proper lookout, and, by reason thereof, ran down a person to whom they owed the duty of watchfulness to avoid injuring him. Applying the facts disclosed by this record to such a supposed case, it will be seen that the negligence of the defendant's employes (conceding them to have been negligent in this respect, for the purposes of the case) was not the sole cause of the injury. But for plaintiff's concurring and co-operating fault, the accident would not have happened. For the errors pointed out, the judgment of the district court is REVERSED.

APPENDIX

Notes of Cases Not Otherwise Reported.

HUGH O'NEIL, Appellant, v. MARGARET O'NEIL.

MOTION FOR ALIMONY—DISMISSAL—ADJUDICATION AS TO ATTORNEY FEES.

Appeal from Page District Court.—HON. A. B. THORNELL, Judge.

FRIDAY, DECEMBER 11, 1896.

THIS appeal is from an order granting to the defendant temporary alimony in a suit for divorce. Plaintiff appeals.—*Affirmed.*

W. P. Ferguson for appellant.

C. S. Keenan for appellee.

GIVEN, J.—I. Plaintiff filed his petition for a divorce on the ground of desertion, and the defendant answered, alleging that plaintiff had become ungrateful and overbearing, and abusive to such extent that she was compelled to leave him. On the same day, she filed her motion, asking six hundred dollars temporary alimony. Plaintiff thereupon dismissed his cause of action, and the defendant filed a further motion, "for judgment for costs and attorney's fees, for the reason that the plaintiff has dismissed his action, and that the said expenses have been made through the fault of the plaintiff." The plaintiff filed a motion to strike that part of defendant's motion, claiming for attorney's fees, which motion to strike was sustained. The court held that the dismissal of plaintiff's action did not operate as a dismissal of defendant's answer as a cross-bill for alimony. Thereafter plaintiff filed a reply to the cross-bill, denying any mistreatment on his part, and alleging that the separation was voluntary, admitting that as the fruit of their joint labor they had accumulated nine thousand dollars, and alleging that after their separation, defendant had received two thousand five hundred dollars in cash, in full settlement of all claim for alimony and maintenance, and relinquishing to plaintiff, by quit-claim deed, all claim for dower in his real estate. The case was

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heard on defendant's claim for alimony, and considerable evidence introduced as to the financial condition of the parties, as to what had already been given to the defendant, and the agreements between them. Upon this evidence, the court seems to have concluded that the defendant was not entitled to permanent alimony or maintenance, and, as the defendant has not appealed, we are not called upon to review this conclusion. The court sustained defendant's motion for temporary alimony, allowing her seventy-five dollars for attorney's fees and fifty dollars for expenses in preparing for trial; and it is from this order that plaintiff appeals.

II. Plaintiff contends that the sustaining of his motion to strike defendant's motion for judgment for attorney's fees, was an adjudication against the defendant's right to attorney's fees, and that the court had no jurisdiction to thereafter allow it. Defendant's motion for six hundred dollars temporary alimony, that remained undisposed of, included the subject of attorney's fees; and her second motion was properly stricken, not upon the ground that she was not entitled to an attorney's fee, but because it was merely duplicating the pending motion. The fact that the plaintiff had dismissed his cause, did not, under the state of the pleadings, deprive the court of jurisdiction to inquire as to the defendant's right to alimony. Plaintiff had, by his action, caused the defendant to incur expenses, including an attorney's fee, in preparing for the trial; and it was clearly within the power and discretion of the court to make an allowance therefor in favor of the plaintiff, and to render judgment against the defendant for the allowance. The judgment of the district court is **AFFIRMED**.

L. M. BESSER, Appellant, v. WALTER DAVIS.

INJUNCTION—USE OF DRAIN—DAMAGES.

Appeal from Dallas District Court.—HON. J. H. HENDERSON, Judge.

FRIDAY, DECEMBER 11, 1896.

SUIT in equity to enjoin the defendant from maintaining a tile drain connecting with a drain which passes through the land of one Robinson, and onto the land of the plaintiff. There was a decree dismissing the plaintiff's petition, and he appeals.—*Affirmed.*

Cardell & Nichols for appellant.

S. D. Nichols for appellee.

ROTHCOCK, C. J.—The plaintiff is the owner of a farm of eighty acres, which adjoins the farm of A. D. Robinson. The two tracts of land are in the same quarter section. There is a public road along the section line on the west side of both farms. The defendant owns a farm situated across the road from the farm of Robinson. There is low, wet land and a pond on and near the line between the farms of Robinson and the plaintiff. In the year 1889, the plaintiff and Robinson placed tiling in this low land, in such a way as to make a system of drainage on both of their farms. The tiling was laid so as to conduct the drainage down through the plaintiff's land, and the main drain curved back so as to make the discharge from the system from an eight-inch tile on the line of Robinson's land. There were lateral branches from both farms to the main line of tile. There is a pond on the land of the defendant across the road from the land of Robinson. In July, 1893, the defendant laid a line of tiling from this pond in a diagonal direction down to and across the public road, and to Robinson's line, and there connected it with a line of tiling laid by Robinson as part of the system, and which passed through Robinson's land down to and over the line between his farm and that of the plaintiff. The above is the situation of the place in question. It might be better understood if we were to cause a diagram of the lands and tiling to be published with this opinion; but we do not think that is necessary.

As we have said, the defendant made the connection at the line of Robinson's land in July, 1893. This suit was commenced in August of the same year. It was tried in the district court in the month of November following. A large number of witnesses were examined on the hearing. Their testimony was mainly directed to the question of whether the act of the defendant in making a connection with Robinson's tiling, was or would be any damage to the land of the plaintiff. Of course, the testimony of the witnesses consisted largely

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of opinion and speculation as to the effect of the connection. There had not been sufficient time to enable witnesses to testify intelligently as to the effect of defendant's act. But a most controlling fact in support of the finding of the district court is that the farm of the defendant is what is called in law the "dominant estate," and the farms of Robinson and the plaintiff the "servient estates." The natural drainage from defendant's farm, or that part of it where his pond is situated, is on and across the land of Robinson, down on the land of the plaintiff. A number of years ago there was an open ditch from the pond down to the road, and the drainage from the ditch passed over or under the road, and on Robinson's land. The tiling was laid in this ditch by the defendant. It is true, the open ditch, by lapse of time and failure to clean it out, was not as well defined as when it was first dug; but the right of the defendant to maintain the open ditch is not and cannot be questioned. The only real question is whether the defendant ought to be enjoined because he, by a connection with the tiling on Robinson's land, causes the water from his land to be discharged underground, instead of on the surface. There is a very decided preponderance of the evidence that the discharge of the water underground is less likely to be a damage to the plaintiff than it was before the connection was made; and we think the evidence fairly shows that Robinson consented that the defendant might make the connection; and it fairly appears from the evidence that the main trouble with the plaintiff is that the insufficient discharge or outlet from his main line of tiling is the principal cause of the trouble of which he complains. We decide this case upon the fact that the plaintiff has not shown that any damage or injury has been done to his land by the act of the defendant. It is therefore unnecessary to enter upon an examination and discussion of the law pertaining to the rights of the adjoining owners of land, in the matter of damages for wrongfully causing a discharge of water from higher to lower lands. The decree of the district court is **AFFIRMED**.

J. & T. BRANDENBURG v. KONRAD KELLER, *et al.*, Defendants.

APPEAL—DISMISSAL—NOTICE.

Appeal from Des Moines District Court.—HON. JAMES D. SMYTHE,
Judge.

THURSDAY, DECEMBER 11, 1896.

ACTION in equity for the foreclosure of a mortgage for the payment of an amount alleged to be due on a promissory note it was given to secure. There was a hearing on the merits and a decree for the plaintiffs.—*Dismissed.*

Blake & Blake and La Monte Cowles for appellants.

Power, Huston & Power for appellees.

ROBINSON, J.—On the twenty-fourth day of April, 1896, Fred Peterson and Margaretha Peterson, made to the plaintiffs a promissory note for the sum of five hundred and fifty dollars, with interest thereon at the rate of eight per cent per annum, payable three years after its date. To secure the payment of the note, the Petersons executed a mortgage on a lot in an addition to the city of Burlington. They afterward sold and conveyed the lot to the defendants, Konrad Keller and Henry Keller, who now own it. The other defendants are alleged to have some interest in the mortgaged premises. The Petersons are now non-residents of this country, and the action is brought for the foreclosure of the mortgage and sale of the lot for the payment of the amount due on the note. The district court rendered a decree of foreclosure as prayed.

The defendants claim that the amount due on the note was fully paid on the eighteenth day of January, 1890. In view of the disposition we are required to make of the case, we deem it proper to say that we have read the record with much care, and are satisfied that the amount due on the note was paid to Theodore Guelich at the time stated, but was never accounted for by him to the plaintiffs. There is much conflict in the evidence in regard to the authority of Guelich to receive the money, but, as the note and mortgage are in the possession of the plaintiffs, the burden was on the defendants to show that the payment to Guelich had the effect to pay the note. We strongly incline to the opinion that the record submitted to us fails to show that Guelich was authorized to receive the money for the plaintiff, and that the preponderance of the evidence shows that he was not. But we have searched the record carefully, without success, to find evidence that an appeal has been taken from the decree of the district

court. We do not find any reference to an appeal. Since it is not shown that this court has jurisdiction of the case, we cannot do otherwise than to dismiss it.—DISMISSED.

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E. CONNOR v. CHARLES A. BENNKE, Appellant.

APPEAL CERTIFICATE—ESSENTIALS—QUESTIONS INVOLVED.

Appeal from Kossuth District Court.—HON. W. B. QUARTON, Judge.

FRIDAY, DECEMBER 11, 1896.

ACTION at law to recover the contract price for certain nursery stock sold and delivered to defendant. Trial to a jury. At the conclusion of the evidence, plaintiff filed a motion for a verdict. This motion was sustained, and the court rendered judgment for plaintiff for the amount of his claim. Defendant appeals—*Dismissed*.

J. C. Raymond for appellant.

Geo. E. Clarke for appellee.

DEEMER, J.—The amount involved being less than one hundred dollars, a proper certificate from the trial judge is necessary to give us jurisdiction. A certificate was granted in this case, the formal part of which is as follows: "The amount in controversy in the above entitled action being less than \$100, and there being questions of law involved, upon which it is desirable to have the opinion of the supreme court, this court certifies the following questions of law for the opinion of the supreme court." Appellee contends that this certificate is insufficient, because it does not state that the questions certified are involved in the case, and he relies upon the case of *Lamb v. Ross*, 84 Iowa, 578 (51 N. W. Rep. 48). The certificate in that case is in almost the exact language of the one given in this, and we there held that such a certificate was insufficient. The questions presented seem to be ruled adversely to appellant in *McAlister v. Sayley*, 65 Iowa, 719 (23 N. W. Rep. 189); *Scale Co. v. Beed*, 52 Iowa, 807 (3 N. W.

W. C. EARLE, Appellant, v. HATTIE BRINK, *et al.*

HARRIS v. BRINK, 100 Iowa, 366, FOLLOWED.

Appeal from Allamakee District Court.—HON. E. E. COOLEY, Judge.

SATURDAY, DECEMBER 12, 1896.

PLAINTIFF, a creditor of John Harris, deceased, brings this action to set aside a conveyance of certain real estate made by deceased to the defendant, and to charge said real estate with said indebtedness. Plaintiff's petition was dismissed, and judgment for costs rendered against him, from which he appeals.—*Reversed.*

Stillwell & Stewart for appellant.

M. B. Hendrick for appellee.

GIVEN, J.—I. Except as to the question of the alleged indebtedness of John Harris to the plaintiff, and appellee's knowledge thereof, the issues and facts in this case are the same as in the case of *Harris v. This Appellee* (decided at the special session December 9, 1896) 100 Iowa, 366 (69 N. W. Rep. 684). We are in no doubt but that the estate of John Harris is indebted to the plaintiff upon the promissory note of one hundred dollars set out, as alleged, and that defendant knew of that indebtedness when she received the deed in question. For the reasons given in the case of *Harris v. This Appeller*, we conclude that the decree of the district court should be reversed. The case will be remanded for decree in conformity with this opinion.—**REVERSED.**

OLIVE P. JUDDINS v. E. A. GUILBERT, *et al.*, Constituting THE BOARD OF MEDICAL EXAMINERS, and J. F. KENNEDY, Secretary, Appellants.

COLLEGE v. GUILBERT, 100 IOWA, 218, FOLLOWED.

Appeal from Keokuk Superior Court.—HON. JOSEPH C. BURK, Judge.

SATURDAY, DECEMBER 12, 1896.

Milton Remley and Daniel F. Miller, Jr., for appellants.

John E. Craig, James C. Davis, and A. Hollingsworth for appellee.

GIVEN, J.—I. Plaintiff, a graduate of the College of Physicians and Surgeons of Keokuk, Iowa, prays that a writ of mandamus issue, commanding the defendant to issue to him the certificate as provided for in section 1, chapter 101, Acts Twenty-first General Assembly. The proceedings had in this case are the same as those had in the case of *Said College v. These Defendants* (decided at the present [December, 1896] special session), 100 Iowa, 218 (69 N. W. Rep 453), and the questions presented on this appeal are the same as those presented and passed upon in that. For reasons given in that opinion, the judgment of the superior court in this case is REVERSED.

J. P. HIATT v. PETER NELSON, Appellant

APPEAL CERTIFICATE—ESSENTIALS—DENIAL IN ABSTRACT.

Appeal from Mahaska District Court.—HON. A. R. DEWEY, Judge.

SATURDAY, DECEMBER 12, 1896.

THIS is an action to recover the rent reserved in a certain lease made and executed by one William Crowby to the defendant, for the term of one year from and after the first day of March, 1891, at the agreed rental of one hundred and sixty dollars per year.

The defendant admitted the execution of the lease, and further pleaded that the plaintiff's assignor failed and refused to give him the possession of the premises at the time agreed upon, and that by reason thereof he has been damaged to the sum of one hundred and fifty dollars. Defendant further says that he paid eighty dollars on the contract before he was fully aware of the extent of his damage, and that this was more than he owed the plaintiff's assignor under the lease, and he asks judgment for the sum of one hundred and fifty

dollars, in addition to the eighty dollars still alleged to be due the plaintiff. The case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Dismissed.*

Byron W. Preston for appellant.

Bolton & McCoy and *F. D. Reid* for appellee.

DEEMER, J.—The first question to be considered is, whether a certificate is necessary to give us jurisdiction.

The plaintiff asks judgment for eighty dollars, the balance which he claims is due him on the lease executed by defendant.

In his original answer the defendant admitted the execution of the lease, but claimed that he was damaged by failure to get possession of the premises at the time agreed upon in the sum of one hundred and fifty dollars, and he asked judgment against plaintiff for costs.

In an amended answer and counter-claim, filed after the verdict was returned, and at the same time the certificate hereinafter referred to was granted, defendant asked "judgment for the said sum of one hundred and fifty dollars in addition to the eighty dollars still alleged to be due by the plaintiff."

It is manifest that when the case was tried, there was but eighty dollars involved, and it further appears that there was no issue taken on the amended answer and counter-claim. Indeed, it seems to have been disregarded by the parties and by the court, for the court proceeded to grant a certificate for an appeal to this court. Moreover, the pleadings, as amended, show that under the facts as stated, the defendant could not have obtained judgment for more than the difference between the rent received, eighty dollars, and the amount of the damages, one hundred and fifty dollars—or seventy dollars. We have frequently held that the amount in controversy is to be determined from the allegations of the pleadings rather than from the prayer thereof. *Cooper v. Dillon*, 56 Iowa, 387 (9 N. W. Rep. 302).

The certificate, in so far as material, is as follows:

"I, A. R. Dewey, judge, * * * do hereby certify that there is a question of law which arose in the trial of this cause, upon which it is desirable to have the opinion of the supreme court. Said question is as follows:"

The certificate does not state that the question certified is involved in the case, and it is therefore, insufficient. *Lamb v. Ross*, 84 Iowa, 573 (51 N. W. Rep. 48); *Connor v. Bennke*, 100 Iowa, 747 (69 N. W. Rep. 414).

II. If it should be conceded that a certificate was not necessary to give us jurisdiction, yet we could not consider the case on its merits, for the reason that appellee states in his amended abstract "that the amended abstract, together with the abstract of appellant, does not contain all the evidence." This statement is not denied by appellant

The record discloses, that at the conclusion of the evidence, plaintiff moved the court to instruct the jury to return a verdict for plaintiff for the sum of ninety-one dollars and fifty cents, and that this motion was sustained.

The questions argued involve a consideration of the evidence, and, as we do not have it all, they cannot be considered. We do not have jurisdiction: and the case is DISMISSED.

THE PHILADELPHIA MORTGAGE & TRUST COMPANY V. JAMES D. STUART, *et al.*, Appellants.

PERSONAL JUDGMENT IN FORECLOSURE SUSTAINED.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

WEDNESDAY, JANUARY 20, 1897.

ACTION for foreclosure of a mortgage, in which personal judgment was asked and obtained against defendants Stuart and Wind, and they appeal.—*Affirmed.*

J. J. Stuart for appellants.

Wharton & Baird for appellee.

LADD, J.—The defendant Johnson executed the mortgage upon which plaintiff obtained judgment, and thereafter, September 30, 1889, conveyed the mortgaged premises to the defendants Stuart and Wind. The deed contained this clause: "Subject, however, to a mortgage given to the Philadelphia Mortgage & Trust Company of Philadelphia, Pennsylvania, for three thousand dollars, and interest, which the grantees hereby assume and agree to pay." In their cross-petition, filed February 18, 1895, the defendants ask that such deed be reformed by striking therefrom the clause quoted, as having been placed therein by fraud. The answer filed by plaintiff denies this, and the issue of fact thus presented is the only question for determination. No useful purpose will be served by a discussion of the evidence. It is sufficient

HENRY CRAIG V. C. A. SYLVESTER, Appellant.

APPEAL—REVIEW—CONFLICTING EVIDENCE.

Appeal from Floyd District Court.—HON. P. W. BURR, Judge.

MONDAY, JANUARY 25, 1897.

THIS is an action upon three counts: One for work done in placing a wall under defendant's building, which is averred to be worth one hundred dollars; in another the sum of ten dollars is claimed for work done in raising certain joists in plaintiff's building; and in another count fifteen dollars is claimed for raising and straightening walls of a building, and five dollars and sixty cents is claimed for stone window sills furnished the defendant. Defendant admits receiving the sills, and says they were to be offset by the use of defendant's buggy, loaned to plaintiff. He admits the agreement to place the wall under his building, but says that said building was to be leveled up, and the joists therein raised and straightened, and that the contract price therefore was seventy-five dollars; that he has paid plaintiff the sum of fifty-five dollars on said work. The defendant denies all other allegations in said counts. In a counterclaim the defendant avers that said work was not done as agreed, and not properly done, by reason of which defendant was compelled to, and did hire other persons to complete it, at a cost of forty-three dollars; and judgment is demanded for fifty dollars. In a reply, plaintiff admits the payment on account of the work done, of thirty-seven dollars, and denies all other allegations of the answer. The cause was tried to a jury, and a verdict for seventy-one dollars and eighty-eight cents returned for the plaintiff. Plaintiff remitted all in excess of sixty dollars, and a judgment was entered for that amount, from which defendant appeals. —*Affirmed.*

Boullon & Brown for appellant.

No appearance for appellee.

KINNE, C. J.—I. It is claimed that the price of the stone sills was paid by the use of defendant's skuly. As to this, the evidence was conflicting, and the jury may well have found that these were not the sills which were paid for by the use of the skuly.

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II. The jury found specially that all the work done by plaintiff for the defendant was under one contract, which was for one hundred dollars, and that but thirty-seven dollars was paid thereon. There was evidence sufficient to sustain these findings. The jury also found that it did not cost the defendant anything to complete the work which plaintiff had agreed to do. From both abstracts presented, it is difficult to determine the real facts as to certain claims of the parties. We discover no reason for interfering with the judgment. The motions will be overruled.—AFFIRMED.

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of the currency had objected thereto, and that it was understood by all parties that the note created no liability against the defendant.—First National Bank v. Felt, 680.

2. SAME—Evidence that such note was executed to a bank by one of its officers to take the place, on the books, of a note from a debtor, after the comptroller of the currency had objected thereto; that the bank officers agreed that the note should create no liability against the defendant; that the debtor's note was also retained by the bank, and a mortgage taken thereafter to secure the same,—shows that the defendant's note was without consideration.—*Idem*.

BILL OF EXCEPTIONS—See PRACT. SUP. CT. ²³.

BONA FIDE PURCHASER—See FRAUD, ¹; NEGOT. INST. ¹, ², ³.

BONDS—See SCHOOLS ⁵.

BOOKS OF ACCOUNT—See EVID. ³, ⁴.

BRIBERY—See EVID. ²⁰.

BURGLARY—See CRIM. LAW, ⁴.

BUYER—GOOD FAITH—See FRAUD. ¹; NEGOT. INSTR. ¹, ², ³.

CANCELLATION—See FRAUD. ¹.

CERTIORARI—See HIGHWAYS, ¹; PRACT. ¹⁰, ¹¹.

JURISDICTION OF SUPERIOR COURT—*Construction of Statute*—Under McClain's Code, section 769, which gives the superior court jurisdiction in *all civil matters*, with certain exceptions, not including *certiorari*, said court can entertain *certiorari* proceedings, though said statute does not mention *certiorari*.—College of Physicians v. Guilbert, 213.

CHALLENGE—See CRIM. LAW, ⁴.

CHANGE OF VENUE—See CRIM. LAW, ⁶; JUSTICE AND MAYOR; PRACT. ¹³, ¹⁴, ¹⁷.

CHILDREN—SERVICES—See PARENT AND CHILD, ¹, ².

CLAIMS—ESTATES, ¹, ².

COLLATERAL ATTACK—See PRACT. ¹³.

COMITY—See RAIL. ¹.

COMPROMISE—See PRACT. ²⁴.

CONFLICT OF LAWS—See ESTATES, ³, ⁴.

CONSIDERATION—See BANKS, ¹; CORPOR. ³; EVID. ²¹.

CONSOLIDATION—See PRACT. ¹⁴; PRACT. SUP. CT. ⁴.

CONSTITUTIONAL LAW—See DRAINAGE, ¹.

CONSTRUCTION -- See INSUR. ¹³; LAND. AND TENANT, ²; PLEAD. ².
1. Contract contract is ordinarily definite,

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2. **Repeal by Implication**—Acts Twenty-second General Assembly, chapter 1, providing for the establishment of a board of public works in cities containing over thirty thousand, was not repealed, and boards of public works established thereunder abolished, by Acts Twenty-third General Assembly (March 13, 1890), for the extension of the limits of certain cities (including those covered by previous acts), which acts provide for biennial elections on the first Monday in April, commencing in 1890, of elective officers.—*Sherman v. City of Des Moines*, 88.

CONSTRUCTION OF STATUTES—See CRIM. LAW, *; ELECTIONS, *; PRACT. *.

CONTRACTS—See CONSTRUCTION, 1; EVID. 1; LAND SALE COM.; PRACT. *; PRIN. AND AGENT; SCHOOLS, 1, 2.

1. **Administrator—Personal Liability**—A written agreement reciting that a firm of attorneys, had been advising the heirs of an estate, and had procured the appointment of a named person as a co-administrator thereof, and that such co-administrator as such, promises to pay a certain sum for such services and to reimburse them for moneys expended, in consideration for which they are to release him and his co-administrator from all claims on account thereof, is, when signed by the co-administrator, *individually*, his individual contract, on which he may be sued individually, whether the services were to the estate or not.—*Argo, McDuffie & Argo v. Blondel*, 353.
2. **Divisibility—Construction**—A contract for the sale of a separator and engine is divisible, and the purchaser cannot rescind the contract in its entirety for breach of warranty as to the engine alone, where the warranty as to the engine and the separator are separate, and the contract provides that the warranty as to one shall not apply to the other, nor in any way affect the payment of the purchase price of the other, and the consideration, though stated in one lump sum, is the aggregate of prices agreed upon as to the different parts,—notwithstanding that the property was described as an establishment.—*Aultman & Taylor Co. v. Lawson*, 569.
3. **Same**—It cannot be urged against the divisibility of a contract for the purchase of a threshing outfit, consisting of several parts, that the consideration is stated as a gross sum, where it appears that this is the aggregate of the prices

CONTRACTS Continued

- but pays no rent, is, on surrendering the farm, liable to account for the value of such personal property, and is entitled to compensation for permanent improvements made on the farm.—*Walker v. Walker*, 99.
5. **LEASE—Evidence**—Under a lease of a building which fixes a certain rent and provides that the rent shall be a lesser sum until the landlord shall cause the premises to be heated by steam, there is no obligation to furnish steam, except as a condition precedent to recovering the higher rental. Nothing is required, at all events, except sufficient heat to make the premises comfortable, and the burden of showing that this was not furnished, is on lessee.—*Gatch v. Garretson*, 352.
 6. **Corporations—POWER OF AGENT TO MODIFY CONTRACT—Contract Provision Against Modification**—Notwithstanding a provision in a contract between a corporation and a private party, that no agent shall have power to waive or modify the contract, an agent having authority to do so, may validly waive compliance with any of its conditions —*Robinson & Co. v. Berkey & Martin*, 186.
 7. **Gaming Contract—Evidence of Intent—Conflicting Evidence on Appeal**—The question whether a contract for the purchase of grain through a broker, contemplated an actual delivery of the grain, or merely a purchase on margins, and was therefore invalid, is to be determined, not only from the contract, but also from the conduct of the parties themselves, and where the evidence as to intent conflicts, this court will not interfere with the finding —*Press & Co. v. Duncan*, 855.
 8. **Land Purchase—Variance Between Deed and Contract**—Where a contract for the sale of lands designated the several tracts by name, and for further description gave the names of the owners of adjoining tracts forming the boundaries of the lands sold, a deed, in which there is a variance as to the names of the owners of lands described as boundaries, is not objectionable for non-compliance with the contract, where it appears that it is the land intended to be conveyed.—*Wilson v. Riddick*, 697.
 9. **Rescission—ESTOPPEL**—Defendant contracted to convey land to plaintiff at a fixed price per acre, the deed was submitted to plaintiff for examination, and it appeared therefrom that there was a small shortage in acreage, and that title was not in defendant, but in his wife, who signed the deed. No objection was made by plaintiff, and the deed was deposited in escrow, as agreed. *Held*, the plaintiff was estopped from afterwards

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- objecting to the shortage and the condition of title, as ground for rescission.—*Idem*.
10. **Specific Performance—Default of Contract**—A purchaser is not entitled to specific enforcement of a contract to convey land, after his default in making payments, which, by the terms of the contract, operated as a forfeiture of all his rights thereunder, without proof of a waiver of such provision by the vendor.—*Foot v. Bush*, 522.
 11. **CONDITIONAL LAND SALE**—A contract for the exchange of lands, entered into by one of the parties thereto, upon condition that his wife should consent and join with him in the conveyance to be made under the contract, is conditional, and cannot be specifically enforced, against husband or wife, unless the wife consents so to do.—*Venator v. Swenson*, 295.
 12. **Substantial Performance—Construction**—A contract for a monument, after giving the exact dimensions of various parts, provided for a "cap, the same as cap on the T monument," which was of larger dimensions than the one called for by such contract. *Held*, that the contract did not call for a cap of the precise dimensions of that on the T monument, but one substantially the same as that, in material, design, style and workmanship, and dimensions suited to the smaller monument ordered.—*Prior v. Schmeiser*, 299.
 13. **Teachers—Damages**—A teacher wrongfully discharged before the expiration of the school year for which she was employed, may recover the entire contract price where, after a reasonable effort, she was unable to secure another position, although she attempted to start a school of her own, which proved to be a financial failure.—*Worthington v. Park Improvement Co.* 39.
 14. **RECEIVERS**—A receiver of a corporation authorized to conduct a college and employ teachers for the "ensuing" year, cannot repudiate a contract with a teacher for the ensuing year, merely because the college, or her particular department, proves to be a financial failure, although the order empowering him gave him authority to make and adopt contracts, such as he might deem "necessary and *advantageous* to the successful operation of the college."—*Idem*.
 15. **Warranty—Waiver**—A provision in a contract for the sale of goods, containing a warranty to the effect that the warranty shall not take effect unless the goods are entitled for or their

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CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE.

CORPORATIONS — ACKNOWLEDGEMENTS, ¹; CONTRACTS, ⁶; EVID. ⁴, ⁶; JUDG. ⁴; NEG. INSTR. ³.

1. **Foreign—Power of State Over**—A state has the power to prescribe the methods by which corporations doing business within it, may be brought into court, and to designate the officer, or agent, either of the corporation, or of the state, upon whom proper process may be served.—*Sparks v. Accident Association*, 458.
2. **Mismanagement—Permitting Default to be Taken**—Where the minority of the stockholders of a corporation move for the appointment of a receiver, on the ground of mismanagement, in that the board of directors had authorized a defense to be made in an action on the corporation note, but that default was fraudulently made, fraud will not be presumed where it is not shown that a defense could have been successfully made.—*Peatman v. Light, Heat & Power Co* 245.
3. **SAME**—The failure of corporation directors to do certain things, is not a ground for the appointment of a receiver at the instance of a minority of the stockholders, where it does not appear that the things omitted could have been done with reasonable effort, with advantage to the company.—*Idem*.
4. **COURTS OF EQUITY**—A court of equity will interfere with the management of a majority of the stockholders of a corporation, at the instance of the minority, only, when such interference is absolutely necessary to the attainment of justice.—*Idem*.
5. **Remedy at Law**—That stock was issued to the corporation's secretary, at his instance, for which he had paid but twenty-five per cent. of the par value, is not a ground for equitable relief, when the creditors have an ample remedy to recover the balance due.—*Idem*.
6. **MINORITY AND MAJORITY**—The policy of a corporation cannot be dictated by a minority of the stockholders, who think that the affairs of the corporation are not being managed for the best interests of the stockholders, and that a different policy should be adopted.—*Idem*.
7. **Signature to Note—Secretary**—Under by-laws which require all contracts and agreements entered into by the corporation to be signed by the president, and also require the secretary to issue and countersign all orders drawn on the treasurer, the signature of the secretary is not essential to the validity of a

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note made by the corporation, and signed by the president.—
Idem.

8. **Ultra Vires Act—Consideration**—An indebtedness incurred by a private corporation in excess of the authority conferred by its articles of incorporation, is, nevertheless, valid and enforceable to the extent of the consideration received therefor.—*Idem.*

COSTS—See PRACT. ³, ⁹; PRACT. SUP. CT. ².

CREDITOR'S BILL—See FRAUD. CONV. ³.

CRIMINAL LAW—See EVID. ⁵, ⁹, ¹⁰, ¹⁴, ²⁰, ²², ²³; PRACT. ²³, ²⁴, ²⁵;
PRACT. SUP. CT. ¹⁷, ¹⁸, ¹⁹.

Accessory—See *post*, ⁴⁸.

1. **Adultery—HARMLESS ERROR**—The admission in evidence of acts of sexual intercourse, subsequent to the date on or about which the act of adultery declared upon in the indictment is charged to have been committed, is not reversible error, where, after the state had elected to stand upon the act testified to as being the first committed, and as occurring on or about the date alleged in the indictment, the evidence as to the other acts was stricken out, on defendant's motion.—State v. Oden, 22.
2. **COMMENCEMENT OF PROSECUTION**—Though Code, section 4008, limits the right to prosecute a married person for adultery, to his wife, this limitation does not apply where the defendant was unmarried when the crime was committed, but married before the finding of the indictment.—State v. Oden, 22.
3. **Assault—CROSS-EXAMINATION—Relevancy**—The prosecutrix, in a prosecution of her husband for an assault upon her with intent to commit murder, may not be asked, on cross-examination, as to whether or not she had stated to a certain person that she was going to marry the defendant for the purpose of getting him to build a house for her.—State v. Clark, 47.
4. **Burglary—CRIMINAL INTENT—Intoxication**—On a trial for burglary, where the defense was intoxication, evidence that witness had been robbed by defendant shortly before the burglary, is admissible to show that, at the time of the burglary, defendant was not intoxicated.—State v. Harris, 138.
5. **Challenge to Juror**—A challenge to a trial juror in a criminal case is properly overruled where it is based on his testimony that he had read an account of the crime charged against the defendant, in the papers, and had heard the matter talked about, and had formed an opinion with reference to defendant's guilt or innocence which it would require some proof to

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- remove, where he further stated that he could render an impartial verdict on the evidence and instructions, without regard to what he had heard and read.—*State v. Brady*, 191.
6. **Change of Venue—Discretion**—On a motion for a change of venue, because of prejudice caused by newspaper reports of the homicide, and the fact that the family of the deceased was influential, and was scattered over the county, it appeared that, though defendant was removed by the sheriff to another locality on the death of the boy whom he shot, he was taken back in a few days to the place of the homicide, where he remained until the trial, which occurred over five months after the shooting, and that the newspaper reports were, in the main, temperate, though some of them referred to mobs and lynching. The state secured a large number of affidavits showing that defendant could have a fair trial in that county. *Held* that a refusal of the motion showed no abuse of discretion.—*State v. Edger-ton*, 68.
 7. **Exceptions—NUNC PRO TUNC ORDER—Order in Vacation**—An order entered in a criminal case in vacation, six months after judgment, reciting that the record did not show that exception had been taken to the instructions given, and that exceptions should therefore be entered as of the date of the instructions, is unauthorized, and of no effect.—*State v. Hathaway*, 225.
 8. **Evidence**—(See *ante*. ³, ⁴; *post*. ⁹, ¹⁰, ¹¹, ¹², ¹³, ¹⁴, ¹⁵, ¹⁶, ¹⁷, ¹⁸, ¹⁹, ²⁰, ²¹, ²², ²³, ²⁴, ²⁵, ²⁶, ²⁷, ²⁸, ²⁹, ³⁰, ³¹, ³², ³³, ³⁴, ³⁵, ³⁶, ³⁷, ³⁸, ³⁹, ⁴⁰, ⁴¹, ⁴².)—**CROSS-EXAMINATION**—The witnesses for defendant may be cross-examined as to statements made by them before the grand jury upon the examination of another charge against defendant, although the minutes of the testimony containing such statements were not returned with the indictment in the case at bar.—*Idem*, and *State v. Cater*, 501.
 9. **Same**—The counsel for the state may, on the cross-examination of a witness for defendant, use a copy of the minutes of her testimony, taken upon the trial of another charge against defendant, for the purpose of showing that she had formerly made statements in conflict with those made upon the trial of the case at bar, and defendant cannot complain because the court did not stop the proceedings and furnish his counsel with a copy of the minutes.—*Idem*.
 10. **Same**—On trial of defendant for assault on his wife with a razor, with intent to kill, where defendant testified that for several hours prior to the occurrence he had been drinking, and had no recollection as to the occurrence, or that he had a razor with him, it was proper cross-examination, for the purpose of impeachment, to ask him if, on the morning

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following the occurrence, he had stated to a third person that he had borrowed a razor which he used at the time of the assault.—*Idem*, and *State v. Clark*, 47.

11. **SHORTHAND REPORT—Admissibility in Subsequent Civil Suit—**
In a civil action for assault and battery, it was not error to admit the evidence of a witness taken in shorthand, on the trial of defendant, for assault to commit great bodily injury on plaintiff, involving the same assault, in which said witness was fully cross-examined, where the proper foundation was laid, and the reporter who took the notes testified at the civil trial as to what the witness said in the criminal trial.—*Kreger v. Sylvester*, 647.
12. **False Pretenses—INSTRUCTIONS —“Falsely” Construed —** An instruction in a prosecution for cheating by false pretenses, which used the word “falsely” to characterize representations which will warrant a conviction, is not prejudicially erroneous where the word as used in the instruction manifestly, meant something more than “mistakenly,” or “untrue,” and the jury must have so understood —*State v. Brady*, 191.
13. **Fraud—SIMILAR FRAUDS—**All the claims filed with the auditor by an overseer of the poor charged with defrauding the county by filing fraudulent claims for transportation of indigent poor persons, are admissible in connection with evidence tending to show that they were fraudulent, for the purpose of showing his fraudulent purpose in filing the claims upon which the indictment counts, and to show the existence of systematic scheme or plan to defraud the county, and thus to negative the idea that the filing of the claim in question was accidental.—*State v. Brady*, 191.
14. **Grand Jury—ADVICE OF COURT TO—**An indictment is not vitiated because the court gave instructions relating to the law governing the crime charged, to *part* of the grand jurors, in the absence of the others, under a Code provision, that the grand jurors may at reasonable times ask the advice of the court; where all the jurors who so desired, received the instructions.—*State v. Edgerton*, 68.
15. **PANEL—SELECTION—**Under Code, section 286, requiring the county auditor to apportion the number of grand jurors to be selected from each election precinct, “as nearly as prac-

CRIM. LAW Continued

number of names apportioned it than it was entitled to.—*Idem*.

16. **Identification of Defendant by Standing Up**—During the trial of a criminal case, the defendant's brother, who greatly resembled him, took a seat by his side, as a test of identity. At the request of the attorney for the state, the judge ordered the defendant to rise for identification, against the objection of his attorney. The prosecuting witness then identified the one who stood up as the one who committed the offence charged. *Held*, that the action of the court in compelling the defendant to rise was not error, as compelling him to criminate himself, neither was it an abuse of discretion to refuse letting defendant make the test attempted by him.—*State v. Reasby*, 231.
17. **Included Offenses**—(See *post*, "4, "48")—Code, sections 4465, 4466, providing that on an indictment for an offense consisting of different degrees, the jury may find defendant guilty of a degree inferior to that charged, or of any offense necessarily included in that charge, does not apply where the facts show that defendant is either guilty of the crime charged, or is innocent of any offense; hence the court need not charge as to the lower grades of the crime.—*State v. Cater*, 501.
18. **Indictment—Construction**—An indictment charged that defendant made an assault upon his wife, and did then and there cut her with a razor, "with felonious intent *then and there* to kill and murder her." *Held*, as battery is not essential to the crime charged, the allegation concerning it may be treated as surplusage, and so doing, it is clear that the phrase "then and there," *last used*, refers to the assault; and the indictment is a sufficient charge of assault to murder, under the statutory rule that the indictment shall enable a person of common understanding to know that said charge was intended.—*State v. Clark*, 47.
19. **INDORSEMENT ON—Witnesses in Contradiction**—It is not necessary that the name of a witness for the state, called merely for the purpose of contradiction, should appear indorsed upon the indictment.—*Idem*.
20. **Instructions**—(See *ante*, "12; *post*, "4, "48, "50")—**CONSTRUCTION OF CHARGE—Reasonable Doubt**—A charge that defendant cannot be convicted unless the state has overcome the presumption of innocence, and has made out every material allegation of the indictment beyond all reasonable doubt, and that satisfactory proof is required, and that no mere preponderance of testimony will be sufficient to warrant a conviction, unless so strong as to remove all reasonable doubt of guilt, is not objectionable as authorizing a conviction on a

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- "mere weight or preponderance" of evidence—*State v. Brown*, 50.
21. *Same*—On trial for larceny, a charge as to the value of the property taken, containing a recital, "If you find, from the evidence, that defendant did take and carry away the property referred to," is not objectionable, on the ground that there was evidence in the case as to other property aside from that mentioned in the indictment, where, from the remainder of the charge, it was clear that the words, "property referred to," meant the property referred to in the indictment.—*Idem*.
22. **EMPHASIZING—Underscoring Parts**—The underscoring of words in the instructions submitted to the jury in a criminal trial, is improper, as its tendency is to give undue weight and force to the words, or sentences, underscored, and thereby to prevent the jury from giving the other portions of the charge the weight and consideration which they should have.—*State v. Cater*, 501.
23. **STATUTE OF LIMITATIONS**—An instruction directing a jury in a criminal case to inquire whether defendant had committed the crime at any time within the three years prior fixed by the statute of limitations, is not erroneous, although the facts limited the inquiry to a much less time.—*State v. Waddle*, 57.
24. **JURY—EXEMPTION FROM JURY DUTY**—The judges of election may return for grand jurors persons over the age of sixty-five years, under Code, section 234, requiring them to return seventy-five competent persons liable to serve as jurors, as the provision of section 228, exempting persons over sixty-five years of age from jury service, creates a personal privilege which may be waived.—*State v. Edgerton*, 63.
25. **Larceny**—(See *ante* 1; *post* 80)—Evidence that the prosecuting witness, on the morning of the theft of his harness, found tracks leading from his barn to a place where a horse and cart had been hitched, and followed the tracks of the cart to within a short distance of defendant's home; that it rained just before the theft; that two tracks, evidently made by the same vehicle, were plainly seen; that a cart was found standing in defendant's yard, and that the harness was found two days afterwards in a box which defendant was shipping to another state,—is sufficient to sustain a conviction, notwithstanding evidence tending to show an alibi and that defendant purchased the harness from third persons.—*State v. McKinstry*, 82.
26. **CONTRADICTION**—Where the owner of stolen goods testified that they were worth a certain sum, he cannot be impeached

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CRIM. LAW- LARCENY Continued

by evidence that, in a suit to recover their value, he had placed a larger value on them.—*State v. Brown*, 50.

27. **CROSS-EXAMINATION**—The owner of stolen hogs, who has testified on his direct examination, in a prosecution for larceny of the hogs, as to missing them from his pen, or pasture, cannot be asked on cross-examination as to having trouble, or a personal encounter, with defendant, where, up to that time, no evidence has been introduced to connect defendant with the theft.—*Idem*.
28. **FIXING TIME**—The owner of stolen hogs may be asked, in a prosecution for the larceny thereof, as to when he got back certain hogs other than those alleged to have been stolen, for the purpose of fixing the time when the hogs in question were missed.—*Idem*.
- 28½. **Manslaughter—Jury Question**—It appeared that defendant took up some posts set by deceased for a division fence, on what deceased believed was the line between their farms, but which defendant claimed was not such line; that soon afterward, as defendant was driving his seeder over the line, and on that land claimed by deceased, the latter stopped it; that defendant went where deceased was; that, during a fight which ensued, defendant stabbed deceased with a pocketknife, killing him; that the trouble about the division line had existed about a year; that defendant had been acquitted of trespass, for which deceased had him arrested; that defendant was a much smaller and younger man than deceased; and that, as defendant knew, a few days before the fight, deceased put his shotgun in his wagon, and drove to the disputed line. There was evidence that, before such dispute arose, deceased carried a revolver, that he was quarrelsome, and in the habit of making threats of violence to others. Defendant knew his character. He testified that, after he was acquitted of trespass, he was told that deceased said that, if he could not keep him off his land by law, he would with a shotgun; that he stabbed him because of threats that deceased had made, and because he did not know but that he had a weapon of some kind in his pocket, and he supposed that he would be killed or seriously hurt if he did not defend himself; that he did not intend to kill deceased, and aimed to strike him in the leg, somewhere; that while he was getting out his knife, deceased was following him up; that he had his knife in his right hand, and was warding off the blows with his left; and that, if he had run, he might have got away. Deceased had no weapon. *Held*, that the evidence supported a verdict for manslaughter.—*State v. Warner*, 260.

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29. **Murder**—(See *ante*, ¹⁸, *post*, ²², ²⁴, ²⁷)—**DEFENSES**—*Improper Surgery*—A person who inflicts a dangerous wound from which death ensues, cannot defend a charge of murder on the ground that deceased might have recovered had he been treated according to the most approved surgical methods.—*State v. Edgerton*, 63.
30. *Theft*—On the trial of one charged with fatally shooting a boy whom he caught robbing his melon patch, evidence that, previous to the robbery, certain burst melons were found in the highway near the defendant's garden, cannot be received as explaining his presence in the patch at the time of the robbery, armed with a loaded revolver; there being no proof that defendant knew anything about these melons, or that they came from his premises; and stealing his melons would not justify the deadly use of a deadly weapon.—*Idem*.
31. **EVIDENCE**—*Limiting*—Evidence on the effect of firing a pistol in close contact with and at a person, as to burning the flesh, or burning or singeing the hair, should not be restricted to the effects, in that respect, from firing the pistol with which the alleged homicide is claimed to have been committed, but may include the effects of firing a pistol of the same caliber.—*State v. Cater*, 501.
32. *Relevancy*—The coroner may say that he told the sheriff in the presence of defendant about keeping defendant's shoes, the shoes being in evidence in connection with evidence as to tracks made by defendant.—*Idem*.
33. **INSTRUCTIONS**—An instruction in a murder trial, in which the defense is suicide, that the defendant sets up no affirmative defense and no matters in extenuation, and relies wholly upon the denial of his guilt, and wholly upon his anticipation of a failure by the state to prove the case against him, is unfair in its phraseology, as it is calculated to impress the jury with the idea that, in the court's opinion, the defendant knows he is guilty, has no defense, but hopes to escape justice by reason of the inability of the state to show his guilt.—*State v. Cater*, 501.
34. *Same*—The jury should not be told to "follow your convictions" in determining who is the guilty man.—*Idem*.

CRIM. LAW—MURDER Continued

- fails to do so, he must be a murderer, is erroneous where the only defense was suicide; as it is calculated to confuse the jury, and make them believe that the defendant must, in any event, make the proof referred to.—*Idem*.
86. *Included Offenses — Construed Together*—An instruction defining involuntary manslaughter, is not erroneous because it fails to define voluntary manslaughter, if there are other instructions covering the omission.—*State v. Edgerton*, 68.
87. *Province of Jury*—An instruction in a murder trial, in which the defense is suicide, "that the drawing of the pistol shows premeditation; the cocking of it and leveling it at a particular vital spot, shows deliberation." and that the conclusion is irresistible that under the law and the undisputed facts in the case, the killing of deceased was an act possessing all the elements of murder in the first degree, and that it was murder in the first degree,—is erroneous, as it is a clear usurpation of the powers and province of the jury.—*State v. Cater*, 501.
88. *New Trial*—Newly discovered evidence is not a ground for a new trial in a criminal case, under the Iowa statutes.—*State v. Cater*, 501.
89. *SAME*—A new trial will not be granted in a criminal case for newly discovered evidence; especially where the evidence in question is, merely, cumulative.—*State v. Waddle*, 57.
40. *Notice of Evidence — Proof of Service*—Proof that a notice advising of proposed additional witnesses in a criminal trial has been served, must be made either by formal return like that required on an original notice, or, else, by other evidence showing that the notice was in fact given to the defendant, as the statute requires.—*State v. Allen*, 7.
41. *Perjury—INCITING PERJURY—Amount of Proof*—The rule that obtains in a prosecution for perjury, that the falsity of the testimony must be established by two witnesses, or the testimony of one, supported by corroborating and independent circumstances equivalent in weight to the testimony of a single witness, does not apply in a prosecution under the Code, section 8988, making it a crime to incite or procure another to commit perjury, though no perjury be committed.—*State v. Waddle*, 57.
42. *Same*—Nor is it essential that a case shall be pending when the false oath is incited.—*Idem*.

Practice—See *ante*, 1, 2, 3, 4, 7.

Preparing Trial—See *post*, 48.

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CRIM. LAW Continued

- 43. Principal and Accessory—Construction of Statute—**Under Code, section 4814, which abrogates the distinction between an accessory before the fact and a principal, making both principals, it is error to charge, no conspiracy being involved, that a defendant who did not actually commit the act constituting the crime, which was committed by another, is guilty, if at all, of whatever offense the evidence shows such other to have committed. This statute simply changes the crime to a substantive one, and makes it so far independent that one who would have been an accessory at common law, may be dealt with as a principal, without reference to the prosecution of him who would, at common law, have been the principal.—*State v. Smith*, 1.
- 44. Rape—WHEN ASSAULT AND BATTERY NOT INCLUDED—Charge—**Where the only question contested on a trial for rape was as to the consent of the prosecutrix to the act of intercourse, it is unnecessary to instruct the jury, that the crime charged includes the offense of assault and battery; for there should be no conviction for assault and battery if the crime is clearly rape, nor where intercourse is had upon consent.—*State v. Beabout*, 155.
- 45. CONSENT—**An instruction on a trial for rape, that if the jury find that the prosecutrix did not consent to the act of intercourse, directly or by inference, they will be justified in finding that it was by force, while not to be approved, may not constitute prejudicial error, when considered with the other instructions.—*Idem*.
- 46. CROSS-EXAMINATION—**Where defendant said he "went to have some sport with the girls," he may be asked, on cross-examination, whether he meant sexual intercourse by such expression, and whether he did not know that such intercourse was a crime.—*Idem*.
- 47. Robbery—CONNECTING DEFENDANT—**On a trial for robbery, it appeared that the prosecuting witness had gone to a pump near the railroad track, to draw water for his stock; that two colored men had come up and asked if they should not fill the trough. Witness gave permission, and started across the track. When part way across he looked back and saw the two men just behind. A moment later, he was struck on the head, knocked insensible, and robbed. He identified the defendant as one of the two men, and three other witnesses, who saw the two colored men talking to witness at the pump, also identified defendant as one of them. *Held*, that the evidence was sufficient to connect defendant with the crime.—*State v. Reasby*, 231.
- 48. INCLUDED OFFENSES—Charge On—**On a trial for robbery, where there was no evidence tending to show that the offense

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CRIM. LAW Continued TO DAMAGES

might have been larceny, it was not error to fail to instruct as to such offense.—*Idem*.

49. PRESUMPTIONS—If one is present when and where a robbery takes place, it is the presumption, in the absence of proof to the contrary, that he was there as a participant, and that he is, in law, guilty of all that was done.—*Idem*.
50. Self Defense—APPREHENDED DANGER—An instruction which makes the right of self defense depend upon the actual necessity to protect one's self, and not upon the existence of reasonable ground for believing that it is necessary, is erroneous.—*State v. Smith*, 1.
51. DEFENSE OF DWELLING HOUSE—"Dwelling House" Defined—The fact that a man sleeps and keeps his clothes in the back part of a room used as a store, under an agreement with the tenant, does not justify him in defending the building against intruders, as his dwelling house, or private habitation.—*Idem*.
52. RULE—The killing of an assailant is excusable on the ground of self defense, only, when it is, or reasonably appears to be, the only means of saving one's own life, or preventing great bodily injury, and, if the danger can be avoided by retreat, or otherwise, the killing is not excusable.—*State v. Warner*, 260.

Statute of Limitations—See *ante*. ²².

Trial—See *post*. ¹⁴.

53. Waiver of Time to Prepare for Trial — Where defendant moves for a continuance on the ground of absent witnesses, and the motion being about to be sustained, the state admits that the witnesses will testify as claimed, and the trial is then proceeded with without objection, he waives the right given by Code, section 4419, that he should be entitled to three days in which to prepare for trial, if, on entering his plea, he demands it.—*State v. Harris*, 189.

COUNTERCLAIM—See PRACT. ⁴.

COUNTIES - See SCHOOLS ⁴.

COURTS—See DRAINAGE ⁴.

COURT AND JURY—See JURY QUESTION.

COURT AND GRAND JURY—See CRIM. LAW, ¹⁴.

DAMAGES—See PAGE 744—ATTACH., ¹; CONTRACTS, ¹², ¹⁴; ESTATES, ⁵; EVID., ²²; PRACT., ⁴, ⁵, ²⁰; PRACT. SUP. CT., ²⁷.

1. Amount—A verdict for one thousand dollars for personal injuries, will not be set aside as excessive, where they are serious, and the evidence tends to show that they are permanent.—*Osborn v. Jenkinson*, 433.

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DAMAGES Continued

2. **Bailee**—A bailee in possession of goods for the purpose of sale, has such an interest as to enable him to maintain an action for injury to, or loss of, the property, from the negligence of another.—*Allen v. Barrett & Carlton*, 16.
3. **Disfigurement**—In an action for personal injuries, disfigurement caused by the injury may be considered in assessing the damages.—*Newbury v. Manufacturing Co.* 441.
4. **Doctor Bills**—A minor living with his parents, cannot recover in an action for personal injuries, the cost of medical services, at least, until he has paid the bill, as the parents are primarily liable therefor.—*Idem*.
5. **Exemplary**—It appeared that, while plaintiff, who had dealt with defendant for years, was seriously ill, the latter, fearing that he might die, and that they would have to wait a year for their claim if the property went into the hands of an administrator, endeavored, by intimidation and threats of legal process, to induce plaintiff's wife and daughter to turn over some of the property, and failing in this, they sued out a writ of attachment, for the alleged reason that plaintiff was about to convert the property into cash, for the purpose of placing it beyond the reach of creditors. *Held*, that five thousand dollars for exemplary damages for wrongful attachment was not so excessive as to be disturbed on appeal.—*Union Mill Co. v. Prenzler*, 540.
6. **Setting Fire—INSURANCE AS A DEFENSE**—Defendant, in an action to recover damages for the negligent burning of a building, cannot claim a reduction of damages in the amount paid to plaintiff by an insurance company, especially where plaintiff has agreed to reimburse the insurance company if he recovered of defendant.—*Allen v. Barrett & Carlton*, 16.
7. **VALUE OF DEFENDANT'S PROPERTY DESTROYED—No Defense**—Evidence as to the value of the property of defendants, destroyed by fire, which is charged to have been negligently set by them, is not admissible in an action against them for the destruction of premises, by fire said to be communicated from their building.—*Idem*.
8. **Total Disability—Pleading**—An instruction, in an action by a railroad engineer for personal injuries, which fails to specifi-

DAMAGES Continued TO DEMURRER.

though incapacitated for manual labor, he remained able to earn money otherwise.—*Laird v. C., R. I. & P. R'y Co.* 836.

9. **Vacation of Judgment by Confession—Attorney Fees**—In a suit to set aside a judgment by confession, expenses incurred by the plaintiff in the litigation, as attorney's fees, hotel expenses and loss of time, cannot be recovered as damages.—*Bull v. Keenan & Sons*, 144.

DECREE—See PRACT. ¹⁵.

DEDICATION.

PRESCRIPTION—A pier erected by one who has purchased a right to erect it from the owner of the adjoining land, does not become a public one, merely because it is erected near the site of one which had previously been used by all desiring to use it.—*Mills & Allen v. Evans & McCutchin*, 712.

DEED—FRAUD. ^{1, 2}; PARENT AND CHILD, ³; PRACT. ²⁷.

Delivery—Plaintiff executed a deed to his children, leaving it with the justice who took the acknowledgement. The deed was sent to the recorder by the justice, but was recalled by the plaintiff before it was recorded. The grantees had no knowledge of the existence of the deed until about a year later, when plaintiff's wife, without his knowledge or authority, gave it to one of the grantees, who had it recorded. *Held*, that there was no delivery of the deed by the grantor, sufficient to render it operative.—*O'Connor v. O'Connor*, 476.

DEFAULT—See JUDG. ^{2, 4}; ORIG. NOTICE; PRACT. ¹⁶; PRACT. SUP. CT. ²¹.

DELIVERY—See DEEDS; PRACT. ²¹.

DEMURRER—See ATTACH. ²; PLEAD. ^{2, 7}; PRACT. SUP. CT. ^{7, 8}.

Construction of Statute—The provision of Acts Twenty-fifth General Assembly, chapter 86, that when a demurrer shall be overruled, and the party demurring answers or replies, the ruling on the demurrer shall not be considered as an adjudication of any question raised by the demurrer, applies to a case tried on its merits after the passage of such act, although the ruling on demurrer was made before its passage.—*Bibbins v. Polk County*, 493.

DESCENT AND DISTRIBUTION—See ESTATES, ^{2, 4}.

DIRECTED VERDICT—See PRACT. ¹⁷.

DITCHES—See DRAINAGE, ^{1, 2, 3, 4, 5}.

DIVORCE—See ALIMONY.

DOCTOR BILLS—See DAMAGES, ⁴.

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DRAINAGE

DRAINAGE—See PAGE 744.

1. **Constitutional Law**—The unconstitutionality of Acts Twentieth General Assembly, chapter 186 (as originally enacted), providing for the establishment of ditches to reclaim lands, because of the failure to give a right of appeal from the order levying the tax, is not available in an action to enjoin the collection of taxes levied to pay for the construction of such a ditch, where the tax was not levied until after the right to appeal had been given by subsequent legislation, although the proceedings for the establishment of the ditch were had before.—*Butts v. Monona County*, 74.
2. **Establishment**—*Substantially Similar Surveys*—A tax levied to cover the expenses of building a drainage ditch is not invalid because a change was made in the survey originally fixed upon by the supervisors, so that the survey, as accepted, did not occupy the line of the original, if it appears that the two surveys corresponded in length, and were on, substantially, the same line.—*Idem*.
3. **PETITION**—The finding of the board of supervisors that a petition for the construction of a public ditch, had been signed by one hundred legal voters of the county, involving a finding that all the requirements of the law had been fully complied with, and the evidence furnished by the fact that the petition bears the names of more than one hundred persons, is not overcome by the testimony of a witness that, in his opinion, there were one or two less than one hundred legal voters on the petition.—*Idem*.
4. **Rejection of**—The fact that the county supervisors rejected that portion of a petition made under Acts Twentieth General Assembly, chapter 186, which sought the issuance of bonds for payment of costs of drainage, does not show that they also rejected that portion of the petition which sought the establishment of the drain, or abandoned the proceedings to establish.—*Idem*.
5. **POWERS OF COUNTY BOARD**—The board of county supervisors, in a proceeding for the establishment of a public ditch, under Acts Twentieth General Assembly, chapter 186, has jurisdiction to establish such drainage within the territory and through such lands as it deems proper, to effect the object of reclaiming the swamp and overflowed lands in the locality to be drained.—*Idem*.

DWELLING HOUSE—See CRIM. LAW, ⁵¹.

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ELECTIONS

TO

EST. OF DECED.

ELECTIONS—See SCHOOLS, 4.

1. **Australian Ballot Law**—A ballot should not be excluded as bearing an identification mark, under Acts Twenty-fourth General Assembly, chapter 33, where the mark relied on was made by the election officers, and consisted merely of an alteration or addition to the name of the candidates, which was also made on other ballots, so that it does not afford any means of identifying any particular ballot.—Cook v. Fisher, 27.
2. **OFFICIAL BALLOT**—Though chapter 33, Acts Twenty-fourth General Assembly, provides particularly how the official ballot shall be prepared, corrected, and furnished, the making of said addition or alteration did not prevent said ballots from being official ballots, and, hence, did not require the rejection of the vote of the precinct.—*Idem*.
3. **Construction of Statute**—Such act is not so far mandatory as to require that a voter shall be deprived of his right to vote, because a technical mistake is made in printing the name of a candidate.—*Idem*.
4. **Contest—ESTOPPEL TO OBJECT—By Offer of Similar Evidence**—A party to an election contest is not estopped from objecting that the entire vote of a township is illegal because the ballots cast therein are all illegal, by offering in evidence ballots cast therein, for himself, where he couples his offer with the condition that they shall be counted for him, only, in case the ballots are declared legal, and the vote of the township held valid.—*Idem*.

ELECTION OF REMEDIES—See PRACT. 10.

EQUITY -- See MECH. LIENS; CORPOR. 4, 6; ESTATES, 1; JUDG. 6; PRACT. 14, 17; RESCISSION; SPECIFIC. PERFORM.; TAXATION, 2.

ESTATES OF DECEDENTS.

1. **Claim—EQUITABLE RELIEF—"Peculiar Circumstances"**—Entitling a claimant against a decedent's estate, to equitable relief against the bar of the statute, for failure to file his claim within twelve months (Code, section 2421), are not shown by the fact that a stranger to the settlement of the estate, who was also liable on the claim, represented to claimant that decedent's widow, who was also liable, was decedent's sole devisee, and that she would give him additional security, and that prior liens against land mortgaged by decedent to secure the claim would be paid off, by reason of which representations claimant forbore filing the claim,—at least, where he made no investigation of the condition of the estate for more than six months, and where said statements and promises

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TO

ESTOPPEL

were made without the authority of the widow.—*Schlutter v. Dahling*, 515.

TATUTE OF LIMITATIONS—Under Code, section 2421, requiring claims against a decedent's estate to be filed within twelve months after notice by the administrator, unless the claim is pending in the district court, the pendency of a suit, which on the death of a decedent is not revived against his representatives, but is dismissed as to him, before the expiration of the twelve months, does not toll the statute.—*Idem*.

3. **Descent and Distribution**—**CONFLICT OF TREATY AND STATUTE**—Under Constitution of the United States, article 6, providing that the constitution, laws made in pursuance thereof, and federal treaties with foreign countries, shall be the supreme law of the land, notwithstanding anything in the constitution or laws of a state, to the contrary, a federal treaty with a foreign country, conferring on its subjects, notwithstanding their alienage, a qualified right to take by inheritance lands in the United States, under the laws here controlling its descent, must prevail over a state law prohibiting aliens from taking lands by descent.—*Opel v. Shoup*, 407.
4. **SAME**—**Federal Power**—A federal treaty with a foreign country, which, by conferring on subjects of that country a right, notwithstanding their alienage, to take, by inheritance, lands in the United States, according to the laws here controlling its descent, removes from them the disability imposed by a state statute prohibiting aliens from inheriting lands within its limits, does not alter the laws of descent of the state so as to render it unconstitutional as an infringement of the right of the state to control its internal policy.—*Idem*.
5. **Survival of Action**—**Damages**—The death of plaintiff, pending suit for wrongful attachment, and the substitution of his administrator, will not prevent the recovery of exemplary damages which might have been recovered by decedent himself.—*Union Mill Co. v. Prenzler*, 540.

ESTOPPEL—See **ELECTIONS**, *; **FRAUD. CONV.**, *; **NEW TRIAL**, *; **PRACT.**, *; **REFEREES**, *; **SCHOOLS**, *.

1. **Husband and Wife**—**Evidence**—Evidence that defendants had

ESTOPPEL Continued

TO

EVID.

2. **Landlord's Lien—MORTGAGE—PRIORITY**—Landlords, who had a chattel mortgage on their tenant's property, wrote H, who had been asked to make a loan to the tenant, that they would release the mortgage, without mentioning a landlord's lien held by them. H understood they intended to release the lien, and made the loan secured by mortgage, believing, because of the promise to release, his would be the first lien; and they sent the release understanding, that because of it, he would make the loan, and that his intention was to have first lien. *Held*, that H's loan was prior to the landlord's lien.—Wood v. Duval, 724.

EVIDENCE—See BANKS, 1, 2; CRIM. LAW, 1, 2, 3, 9, 10, 25, 27, 28, 31, 32, 44; ESTOPPEL, 1; LAND. AND TEN. 2; NEGOT. INSTR. 1; PARENT AND CHILD, 1, 2; PRACT. 22; PRACT. SUP. CT., 26; RAIL. 2, 12; TAX. 1.

1. **Agents—DECLARATIONS OF**—Where the correspondence, constituting a contract for the purchase of restaurant fixtures, including a back case and counter, with show cases and drip board, specified the style of the back case, but did not specify the style or material of the other fixtures, or show that they were to be considered as a part of the back case, evidence of the declarations made by the purchaser to plaintiff's manufacturing foreman as to the style and material of the show case, counter and drip board, was admissible, though such foreman had no authority to make such a contract for the sale of such fixtures, where plaintiff made his offer on memoranda made by the foreman.—Deitrich & Capell v. Stebbins, 426.
2. **AGENT AS WITNESS**—The rule, that the authority of an agent cannot be sustained by his own declarations, does not render it improper to prove his authority by his testimony.—O'Leary Brothers v. Insurance Co. 390.
3. **Books of Account—Pairol Variance**—Books of account are not the best evidence, so as to render inadmissible oral testimony as to payments credited therein, and their application.—Christman v. Pearson, 634.
4. **OF CORPORATION—For What Admissible**—In an action on a non-negotiable note, made in consideration of certain corporate stock, where defendant pleaded as a counter-claim a note made by the payee in consideration of stock in a kindred corporation, subsequently organized, and both parties used as evidence the books of the original corporation, all of the contents of the books which tended to enlighten the jury on the motive of the parties and their relations to each other in carrying on the corporations, was properly admitted.—Jackson v. Adams, 163.

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5. **Classification by Witness**—A witness may—for the purpose of assisting the jury in reaching the inference to be drawn from a comparison of the records of railroad companies, showing the sales of tickets during the time covered by the claims filed against the county by the overseers of the poor for the transportation of paupers with the claims in evidence—classify the claims with reference to the record of tickets sold.—*State v. Brady*, 191.
6. **Condition of Corporation**—It was not error to instruct the jury that they might consider the condition of the corporation at the time of the trial, so far as it might have a bearing on the agreement and transactions relating to a promissory note in controversy.—*Jackson v. Adams*, 163.
7. **Copy—Objections**—A written agreement may be proven by copy, unless objection is made on the ground that copy is not the best evidence, or that the proof of the loss of the original has not been made.—*Graff v. Adams*, 481.
8. **Cross-Examination**—A physician who has testified for plaintiff in an action for personal injuries, as to the nature, extent, and probable effect of his injuries, and the amount of his charges, cannot be cross-examined as to whether plaintiff had not told him that the injuries received were due to his own fault.—*Devine v. C., M. & St. P. R'y Co.* 692.
9. **SAME**—A witness who has testified to the bad moral character of another witness, cannot be questioned on cross-examination as to whether he had ever heard certain persons named, not shown to have been acquainted with or to live in the neighborhood of the witness to whose character he had testified, speak of the latter's character.—*State v. Allen*, 7.
10. **SAME**—A sheriff who has testified upon direct examination in a criminal action, that after receiving the warrant for defendant he made search for him, may be asked on cross-examination if the defendant's father had not stated to him the day before the warrant was served, that he would have the defendant come up the next morning and surrender himself, as such fact would tend to affect the credibility of his statement that he could not find defendant, by showing that, under the circumstances, he was not likely to make such a search; and it would bear, as well, on the claim made that defendant was evading arrest.—*Idem*.
11. **Direction of Attorney—"Agreement" by Attorney Defined**—An order by an attorney to a sheriff to turn over property attached, to a third person for safe keeping, is not an agreement, within Code, section 213, providing that no evidence of an agreement

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- of an attorney shall be received except the statement of the attorney, or his written agreement, or an entry thereof on the records of the court—*Citizens National Bank v. Loomis*, 266.
12. **Expert Evidence—Machinery**—Plaintiff's grain was destroyed by fire set by sparks from defendant's engine, operating a threshing machine. A witness testified that he had run an engine for about forty years; had operated the engine in question a little; that he had run similar engines, but never for threshing grain. *Held*, that the witness was competent to testify as to the appliances necessary to keep sparks from escaping from such engine.—*Richardson & Bell v. Douglas*, 239.
13. **VALUE**—Where the articles stolen consisted of a trunk, containing the family wearing apparel, the wife of the prosecutor, having testified that she knew the value of the articles, is competent to testify as to such value, though she may not have known the value in a second-hand store or at public auction.—*State v. Hathaway*, 225.
14. **HANDWRITING—Instructions**—Where witnesses have testified about the genuineness of a signature, both from comparison and from familiarity with the signature of the alleged subscriber, it is proper to charge that "evidence of this character being, in fact, the result only of a comparison of the controverted signature with the genuine signature of the defendant, as the same is remembered and impressed on the mind of the witness, whose opinion is so given, or with other signatures proved to be those of defendant, it is regarded by the law as unsatisfactory, and such as ought not to overthrow the direct and positive testimony of a credible witness who testifies from personal knowledge"—*Jackson v. Adams*, 163.
15. **HANDWRITING EXPERT**—A person whose business for fifteen years required him frequently to make comparisons of handwritings, is competent to testify as an expert in regard thereto, though he testifies that he is not an expert, in the sense of making it his business.—*Christman v. Pearson*, 634.
16. **Explanatory Evidence—Prejudice**—Where it is the duty of the state to explain marks upon a paper, in order to make it admissible, it will not be deemed prejudicial error that the witness, in making explanation, was compelled to impress the jury with the fact that the marks were made to check up fraudulent claims charged to have been made by defendants.—*State v. Brady*, 191.
17. **Fraud—SIMILAR FRAUDS**—All the claims filed with the auditor by an overseer of the poor charged with defrauding the county by filing fraudulent claims for transportation of indigent poor

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- persons, are admissible in connection with evidence tending to show that they were fraudulent, for the purpose of showing his fraudulent purpose in filing the claims upon which the indictment counts, and to show the existence of a systematic scheme or plan to defraud the county, and thus to negative the idea that the filing of the claim in question was accidental.—*State v. Brady*, 191.
18. **Harmless Error**—A witness testified that, shortly after the fire, he examined the smokestack of defendant's engine, and did not find any appliance for arresting sparks. *Held*, that in view of testimony that, between the time of the fire and the time the witness examined it, the spark arrester had been taken off, the admission of the testimony complained of was not prejudicial.—*Richardson & Bell v. Douglas*, 239.
19. **Impeachment**—A witness cannot be impeached by proving contradictory statements made out of court, where no foundation has been laid therefor.—*Kreger v. Sylvester*, 647.
20. **ATTEMPT BY WITNESS TO BRIBE**—*Cross-examination*—The fact that defendant's mother attempted to bribe the county attorney to fix the papers so that her son might escape, is relevant, and may therefore be shown in contradiction of the testimony of the mother, brought out by the state on cross-examination.—*State v. McKinstry*, 82.
21. **CONVICTION OF FELONY**—Under Code, section 3648, providing that "a witness may be interrogated as to his previous conviction for a felony," a witness cannot be asked, on cross-examination, if he had been "arrested" for a felony.—*State v. Brown*, 50.
22. **LIMITING WITNESSES ON IMPEACHMENT**—*Discretion*—A court may, in its discretion, limit the number of witnesses, both as to good and bad reputation of a witness sought to be impeached to five, and this, though part of the five is supplied by reading as evidence, what a motion for continuance states absent witnesses would testify to if present.—*State v. Beabout*, 155.

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24. **Market Value**—Where a witness testified that a table was worth twelve dollars at the time of the loss, it will be presumed that the market value at that time was meant, where the instructions fixed the measure of recovery at the reasonable market value of the property.—*Huston v. State Insurance Co.* 402.
25. **Mortality Tables**—A mortality table, shown to be a standard table used by leading life insurance companies, is admissible in evidence. Whether such showing is essential, is not decided.—*Kreger v. Sylvester*, 647.
26. **Objections--ESTOPPEL--BY OFFER OF SIMILAR EVIDENCE**—A party to an election contest is not estopped from objecting that the entire vote of a township is illegal, because the ballots cast therein are all illegal, by offering in evidence ballots cast therein, for himself, where he couples his offer with the condition that they shall be counted for him, only, in case the ballots are declared legal, and the vote of the township held valid.—*Cook v. Fisher*, 27.
27. **Personal Transactions with Decedent**—Under Code, section 3639, prohibiting a party to any proceeding from testifying against an executor as to transactions with a decedent, a son, entitled under his father's will to a farm which his father purchased for him and put him in possession of, without conveying it to him, as part of his distributive share, at its cash valuation, is not a competent witness on trial of exceptions to the report of distribution, to show that he had paid for certain improvements on the land.—*Ballinger v. Connable*, 121.
28. **Record of Railroad**—The records made by the agent of railroad companies, showing daily sales of tickets, are admissible as substantive evidence under the same circumstances in which they might be read to the jury by a witness who knew that they were true when made, but has no independent recollection, either before or after examining them, as to the sales to which they refer.—*State v. Brady*, 191.
29. **Refreshing Recollection**—A cashier of a bank who testifies that he made the entries in the bank books from slips used in the ordinary course of the bank's business, at the time of the transaction in question, and knew them to be correct, may be permitted to refresh his memory therefrom.—*State Bank of Tabor v. Brewer*, 576.
30. **Repetition--Duty of Judge**—It is the duty of the court, in a fair and effective way, to prevent counsel from going into a matter on the cross-examination of a witness, which has already been covered, and the counsel is himself to blame if

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such action put him in a ridiculous position before the jury, to his client's prejudice.—*State v. Brown*, 50.

31. **Replevin—Irrelevant Evidence**—The petition in a suit by a wife, for separate maintenance, is not admissible, in an action by her father-in-law, against her and the sheriff, for property seized under attachment in the former action, where the only issues in the replevin suit are those relating to ownership and change of possession under a sale from son to father, and fraud in making such sale, and where the fact that the sheriff's possession is under the writ of attachment is not disputed.—*Alborn v. Alborn*, 882.
32. **Fraudulent Conveyance**—In replevin by a mortgagee against a sheriff, who admitted taking certain goods in attachment against the mortgagor, but denied any knowledge of plaintiff's rights, evidence that the mortgage was voluntary, and void as to the mortgagor's creditors, was not admissible, under the issues tendered.—*Farwell Co. v. Zenor*, 640.
33. **Return of Officer—CONCLUSIVENESS—Parol Evidence**—Where a sheriff, to his return on a writ issued in a landlord's attachment, annexed a receipt of a third person for the property attached, and also recited that he held the property subject to the order of the court, he can show by parol that the property was delivered to such third person by direction of the attorney for the plaintiff in the attachment. The return was not required to show that the property had been delivered to a third person on the direction of plaintiff, and as to matters not authorized to be returned, the return is not conclusive.—*Citizens National Bank v. Loomis*, 266.
34. **Secondary and Best**—A witness, even though shown to be familiar with the printed instructions contained in the catalogue furnished by the manufacturers of an engine, as to its management, cannot testify as to what such instructions are, since, even if such instructions are competent to be received, the catalogue itself is the best evidence of them.—*Richardson & Bell v. Douglas*, 239.
35. **Shorthand Report in Criminal Case—Admissibility in Subse-**

- | EVID. Continued | TO | EXECUTION SALE |
|---|----|----------------|
| <p>36. Statute of Frauds—Construction of Statute—Code, 1878, sections 3663, 3664, declaring that no evidence of a contract for the transfer of any interest in land shall be competent unless in writing, etc., does not render inadmissible parol evidence as to the identity of lands described in such contract.—<i>Wilson v. Riddick</i>, 697.</p> | | |
| <p>37. PROMISE TO PAY DEBT OF ANOTHER—Consideration—Collateral Obligation—An oral promise by one to pay a debt of his deceased son-in-law, if the creditor would not make trouble, is within the statute of frauds, where it does not appear that the promisor gained any personal advantage by the creditor's forbearance, and it is shown that, by reason of the insolvency of the estate, the creditor would have received nothing had he pressed his claim.—<i>Schaafs v. Wentz</i>, 708.</p> | | |
| <p>38. Tabulation by Witness—A tabulated statement prepared by an agent of railroad companies, from the companies' records, in evidence, showing the sales of tickets at a certain station during a certain year, and a written statement purporting to be a list of all the names of paupers for whose transportation the overseer filed claims and received county warrants, with dates and destinations prepared by the county auditor from claims, in evidence, are admissible in a prosecution of the overseer for fraudulently making such claim and receiving warrants, and admissible to facilitate a comparison, by the jury, of the records and claims, where the records are complicated and the claims are numerous.—<i>State v. Brady</i>, 192.</p> | | |
| <p>39. Trusts—An assignor of a judgment of foreclosure cannot, under McClain's Code, section 3105, requiring all declarations of trusts relating to real property to be executed in the same manner as deeds, establish a resulting trust in the property, by parol proof of an agreement by the assignee of the judgment, to hold it for him —<i>Hemstreet v. Wheeler</i>, 290.</p> | | |
| <p>40. PAROL EVIDENCE—Parol evidence is inadmissible to show that the assignee of a decree of foreclosure, under a written assignment absolute on its face, agreed to buy in the property on the sale under the decree, and hold it for the assignee.—<i>Idem</i>. Compare <i>Patterson v. Mills</i>, 69 Iowa, 755.</p> | | |

EXCEPTIONS—See CRIM. LAW, 1; PRACT. SUP. CT. 16.

EXECUTION SALE—See PRACT. 18.

CANCELLATION—Construction of Statute—A judgment creditor who has caused execution to be issued, and has bid upon the property levied upon, a larger amount than the judgment and costs, and permits a return on such sale to be made by the

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sheriff, cannot, by a mere choice, treat the sale as a nullity and issue a second execution, and have other property seized and sold thereunder, even, though it does not appear whether the costs were paid or not.—*Harpham v. Worthington*, 818.

EXEMPTION—JURY DUTY—See **CRIM. LAW**, 24.

EXPERT—See **OPINION EVIDENCE**.

FELLOW SERVANT—See **MASTER AND SERVANT**, 1; **NEGLIG.**, 2, 4.

FIRE SETTING—See **DAMAGES**, 6, 7; **NEGLIG.**, 4, 6.

FORCIBLE ENTRY AND DETAINER—See **LAND. AND TEN.**, 4, 5.

FORECLOSURE—See **MORTGAGES** and page 751.

FOREIGN CORPORATIONS—See **CORPOR.** 1; **INSUR.**, 5.

FORFEITURE—See **LAND. AND TEN.**, 2; **INSUR.**, 10.

FORMER ADJUDICATION—See **DEMURRER; PLEAD.** 7, and page 748.

FRAUD—See **CORPOR.** 2; **EVID.** 11; **INSUR.** 6, 7, 16; **NEW TRIAL**, 2; **PRACT.** 40.

1. **Cancellation of Deed**—Evidence that plaintiff, who was over seventy years old, hired a real estate broker to dispose of her land, and that he exchanged the same with defendant for a note secured by a mortgage on twenty-four lots, and without plaintiff's knowledge, secured an additional commission from defendant, and that her land was worth two thousand seven hundred dollars, while the mortgaged lots were worth about one dollar each, but that the broker and defendant fraudulently represented to the plaintiff that they were worth about two hundred dollars each, and that the trade was made on the faith of such representations, will sustain a judgment setting aside the deed for fraud.—*Lillibridge v. Allen*, 582.
2. **DEED FROM PARENT—*Fraud and Undue Influence***—A deed made by a father and mother to their daughter, of property of the value of six thousand to seven thousand dollars, on a consideration approximating three thousand dollars, and a further agreement to support the grantors, who were both over seventy years old, during the remainder of their lives, will not be set aside at the suit of another heir of the grantors, where the evidence fails to establish fraud or undue influence on the part of the grantee, or the incapacity of the grantors.—*Hemstreet v. Wheeler*, 282.

FRAUD. CONVEY.

FRAUDULENT CONVEYANCE—See EVID. ²²; GEN. ASSIGN. ¹, ²; PRACT. ¹⁵, ¹⁶.

1. **Chattel Mortgage**—A note for two hundred dollars, given by a husband to his wife, for money loaned by her before they were married, was renewed by a note for five hundred dollars, which was, in turn, replaced by one for one thousand dollars; each renewal note being for the principal and interest for the prior note, with credits claimed by the wife on sales of dairy products. The husband subsequently purchased merchandise from plaintiffs, and, while indebted to them, gave a chattel mortgage on the goods to his wife to secure the note for one thousand dollars; and another note given to her in payment of a loan which she procured by mortgaging a homestead which her father had given her. *Held*, that the mortgage was not fraudulent as to plaintiff, and this, though defendants fail to show, that each renewal was made for a liability which the wife could have enforced to the full amount of the new note. —Fowler Co. v. McDonnell, 536.
2. **EVIDENCE**—A finding that a chattel mortgage was fraudulent as to a prior unrecorded mortgage, is sustained by evidence that the mortgagor, in executing the second mortgage, intended to defeat the prior one, and that much of the consideration for such second mortgage had no foundation in fact, and the testimony of the second mortgagee is full of contradictions.—Harney v. Jordan, 646.
3. **Creditors' Bill Judgment**—PURCHASE OF SAME BY FRAUDULENT GRANTER—A purchaser of land against whom suits have been commenced by judgment creditors of his vendor to set aside the sale for fraud, and establish their judgments as liens on the land, may purchase a judgment on which such suit is based, and will take with it a lien created by the filing of the creditors' suit, which is entitled to priority over the liens of other judgments on which suits were subsequently commenced. —Boggs v. Douglass, 885.
4. **ENFORCEMENT AGAINST JUNIOR**—In such case, the purchase of the judgment by the defendant, who is the owner of the land, is equivalent to an admission of the validity of the lien, which renders the trial of the action unnecessary; and he may set up the lien by cross-petition, and have it established, in an action for possession based upon a decree upon a junior lien.—*Idem*.
5. **Estoppel—Husband and Wife**—A wife who held notes against her husband at the time of property statements made by the latter, for the purpose of obtaining credit, which omitted all

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reference to the notes held by her, and held said notes at the time of his verbal statement that he did not owe his wife any, thing, is not estopped to deny the truth of such statements—where she did not know of, nor authorize them.—Fowler Co. v. McDonnell, 587.

6. **Future Support**—Property conveyed by a debtor in consideration of an agreement for his future support, is chargeable with a lien in favor of existing creditors who have no other means of enforcing their claims, to the extent that the value of the property and of its use exceeds the amount of the support actually furnished by the grantee, in good faith.—Harris v. Brink, 366.

FRAUD AND MISTAKE—See PRACT. ¹⁸.

FRAUDS—STATUTE OF—See CONTRACTS, ¹.

GAMING—See CONTRACTS, ⁷.

GENERAL ASSIGNMENT.

1. **Preferences—Validity**—Evidence that a father sold to his sons their partnership stock in trade, taking their notes for the price; that they had no other property subject to execution, and the father knew it; that, after conducting business at a loss, the sons, knowing themselves bankrupt, through false statements to a commercial agency, obtained goods on credit, for the purpose of stocking up, and then failing; that the sons then executed a chattel mortgage on their entire stock to their father for their entire debt to him, and, about an hour afterward, on the advice of the father's attorney, made an assignment for the benefit of creditors to their brother-in-law, warrants a finding that the mortgage and assignment constitute one transaction, in effect, a general assignment for the benefit of creditors, with a preference, which, under Code, section 2115, is void.—Creglow v. Creglow Brothers, 276.
2. **MORTGAGE CREATING**—Under Code, section 2115, declaring a general assignment by an insolvent for the benefit of cred-

HIGHWAYS

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INSTRUCTIONS

HIGHWAYS—See PRACT. ¹¹, ²⁷, ⁴².

1. **Vacation—CERTIORARI—Notice**—Where it is sought to review, by *certiorari*, proceedings had to vacate a highway, on the ground that no notice was served on the owner (plaintiff), or on occupants of the land abutting the highway, the petition will be demurrable unless it avers that plaintiff's ownership appeared on the auditor's transfer book, or that he resided within the county, or that said occupants so resided.—McKinney v. Baker, 362.
2. **IRREGULARITIES**—Proceedings of the board of supervisors, vacating a highway, are not void because the appraisers were not appointed on the day set for filing claims, but on another day, as no damages are allowable for vacating a highway, and it is, therefore, immaterial when the appraisers are appointed.—*Idem*.
3. **Petition and Remonstrance — WITHDRAWAL BY REMONSTRANCE**—A signer of the petition required by Acts Twentieth General Assembly, chapter 200, section 4, relating to the consolidation of road districts of a township on petition of a majority of the voters, may withdraw his name therefrom any time before action is taken; and a signing of a remonstrance to such consolidation, by one who had previously signed the petition, operates to withdraw his signature from the petition, where the remonstrance is *presented before action is taken*.—Dunham v. Fox, 131.
4. **Prescription**—A highway by prescription is not shown by evidence of public use for many years, if it was used during a portion, only, of each summer, and had been closed at times, and obstructed by fences, and that when so used, it was by consent of the owner.—Mills & Allen v. Evans & McCutchin, 712.

HOMICIDE—See MANSLAUGHTER—MURDER.

HUSBAND AND WIFE—See FRAUD. CONV. ¹; INSUR. ⁷; JUDG. ²; LIM ACT, ¹; MECH. LIEN, ¹, ².

IMPEACHMENT—See CRIM. LAW, ¹⁰, ²²; EVID. ⁹, ¹⁰, ²¹, ²².

INDICTMENT—See CRIM. LAW, ¹⁷, ¹⁸, ¹⁹.

INFORMATION FOR INSANITY—See LIBEL.

INJUNCTION—USE OF DRAIN—DAMAGES.—Risser v. Davis, 744.

INSANITY INFORMATION—See LIBEL.

INSTRUCTIONS—See CRIM. LAW, ¹², ¹⁷, ²⁰, ²¹, ²², ²³, ²⁴, ²⁵, ²⁶, ⁴⁵, ⁴⁶; EVID. ¹⁴, ²²; INSUR. ⁹; PRACT. ²⁰, ²⁷; RAIL. ²; PRACT. SUP. CT. ¹⁸, ¹⁹.

1. **Applicability—Preponderance of Evidence**—An instruction is properly given on a theory which is supported by some evi-

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| <p>dence, although the preponderance of the evidence may be to the contrary.—<i>Newbury v. Manufacturing Co.</i>, 441.</p> | | |
| <p>2. Construed Together—An objection to an instruction that it fixed a liability on the defendant city for injury caused by snow on a sidewalk, without reference to whether the city had had a reasonable time within which to remove the snow, was cured by an instruction that the city was not negligent if snow had fallen so short a time before the accident that, with ordinary care, it could not have been removed in time to have avoided the injury —<i>Robinson v. City of Cedar Rapids</i>, 662.</p> | | |
| <p>3. SAME—Where the jury are told that negligence was the doing, or omitting to do, what persons of ordinary prudence would not have done, or omitted, and that contributory negligence was such want of care as was directly instrumental in producing the injury, a further charge that plaintiff must use ordinary care to avert danger that could be "readily" discovered, is not misleading.—<i>Davine v. C. M. & St. P. R'y Co.</i> 692.</p> | | |
| <p>4. Cross-Reference—The court may, in its charge, refer to other paragraphs thereof, without repeating them.—<i>O'Leary Brothers v. Insurance Co.</i> 390.</p> | | |
| <p>5. Emphasizing—UNDERSCORING PARTS—The underscoring of words in the instructions submitted to the jury in a criminal trial, is improper, as its tendency is to give undue weight and force to the words or sentences underscored, and thereby to prevent the jury from giving the other portions of the charge the weight and consideration which they should have.—<i>State v. Cater</i>, 501.</p> | | |
| <p>6. Pleadings—SEVERAL COUNTS—Where a cause of action is presented in two counts, it is not error to submit the cause to the jury, to find independently on each count.—<i>Robinson & Co. v. Berkey & Martin</i>, 136.</p> | | |
| <p>7. SUBMITTING PLEADINGS AS PART OF CHARGE—While pleadings, which are couched in untechnical language, may be given to the jury to enable them to understand the issues involved, such issues should be presented in the language of the court, where the language used in the pleadings is technical and is not such as a jury will be likely to understand clearly,—<i>Idem</i>.</p> | | |

INSURANCE—See DAMAGES, 6; EVID. 1; PLEAD. 1.

INS. Continued

employment was interposed, and the witness was dismissed. Plaintiff then gave evidence tending to show that said agent did orally waive proof. The agent then being recalled for further cross-examination, it appeared that he was employed in writing, and that the contract was in Illinois. It also appeared, inferentially, that the contract did not specify his duties, for the reason that he was to go to such places and do such work as should be directed by the manager. *Held:*

- a. As the testimony of the plaintiff was rightfully admitted, as the record stood at the close of the first examination of the agent, said testimony, subsequently elicited, did not authorize the striking of plaintiff's said evidence.
 - b. It does not appear that the writing deprived the agent of power to waive proof of loss, orally.—*O'Leary Brothers v. Insurance Co.* 390.
2. **POWERS OF SECRETARY**—The written consent of the secretary and general agent of an insurance company, that an insured may place additional insurance upon the property covered by its policy, is not the consent of the company which the policy requires to be indorsed thereon in writing, where the policy also provides that no agent shall have power to waive any provision thereof, and no authority on the part of such secretary to make such consent for the company, or to waive such indorsement, is shown.—*Idem*.
 3. **Consent—Written**—An insurance policy providing that it shall be void, if the insured contracts other insurance on the property without written consent *indorsed on the policy*, is avoided by the assured's obtaining such additional insurance without obtaining the required indorsement, although he obtains a letter from the secretary of the company obtaining such consent.—*Idem*.
 4. **Foreign Company—SERVICE OF NOTICE UPON—Presumptions**—Under the statute of Missouri, requiring foreign insurance companies desiring to do business in that state, to first file with the superintendent of insurance, authority to accept service of process in their behalf, and providing that such service shall be binding upon them, a company so served, and which is shown to have transacted business in the state, can not question the validity of the service, on the ground that it has not complied with the law, such compliance being conclusively presumed from the fact of doing business in the state.—*Sparks v. Accident Association*, 458.
 5. **Same**—Under revised statutes, Missouri, section 5915, providing that any person who receipts for money on account of

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- any insurance company not authorized to do business in the state for a policy in such company, though the same may not be required of him as agent, or who makes any contract for such company, shall be deemed its agent, evidence that the general agent of a foreign insurance company solicited applications in Missouri, which were forwarded by him to the home office, where they were entered on the company's register, the applicants paying such agent a membership fee, and that another person in the company's pay afterwards collected assessments in Missouri from the applicants, sufficiently shows that the company was transacting business in that state, though it was provided in the applications that they should not be binding until approved by the secretary in Iowa.—*Idem*.
6. **Fraud**—Under a provision of an insurance policy which requires the assured to submit to an examination under oath, misstatements of fact made by him on the examination after a loss, do not avoid the policy, unless the insured knew them to be false, and made them with a fraudulent intent.—*Huston v. State Ins. Co.* 402.
7. **Same**—Where an insurance policy, by its terms, covers household furniture and musical instruments in a certain house, and contains no limitation as to ownership which would invalidate a claim for a piano owned by the wife of the assured, a claim by the assured for its loss, is no fraud on the insurer, though there may have been a misstatement as to the ownership.—*Idem*.
8. **Household Furniture Defined**—In an insurance policy, the term "household furniture, useful and ornamental," with the added term "family stores," includes books and games, writing materials, child's swing, and child's walker.—*Idem*.
9. **Instructions—Construed Together**—An instruction which, in briefly summing up the facts plaintiff must establish in order to cover a loss under a fire insurance policy, fails to require that the fire must have been "without his fault," is not erroneous, where this requirement has been stated in a preceding instruction, and there is no request to have the objectionable instruction made clear.—*Idem*.
10. **Life Insurance—TAKING NOTE FOR PREMIUM—Forfeiture**—A policy provided for payments coming due in May, and quarterly thereafter, and that failure to pay, upon notice, should work a forfeiture. A note was taken for the first three installments, and it stipulated that they should come due on May nineteenth, and quarterly thereafter, and that a failure to

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- pay an installment should render the whole note due. Notice was given, demanding payment, as fixed by the policy, but no payment was made at either the time fixed by the policy or note. *Held*, the taking of the note did not limit the insurer to sue on the note in case premium installments were not paid, and a forfeiture may be declared under the policy, if payments are not made as provided by either note or policy.—*Beezley v. Life Association*, 486.
11. **Market Value**—Where a witness testified that a table was worth twelve dollars at the time of the loss, it will be presumed that the market value at that time was meant, where the instructions fixed the measure of recovery at the reasonable market value of the property.—*Huston v. State Ins. Co.* 402.
12. **Mortality Tables**—A mortality table, shown to be a standard table used by leading life insurance companies, is admissible in evidence. Whether such showing is essential, is not decided.—*Kreuger v. Sylvester*, 647.
13. **Pleading**—CONSTRUCTION OF—In an action on an insurance policy, an answer which in one count alleges other insurance as a ground for avoiding the policy, and in another count asks to prorate other insurance, if any may be found, does not allege the existence of other insurance, as a basis for prorating the loss.—*O'Leary Brothers v. Insurance Co.* 390.
14. **Waiver by Agent**—An agent of an insurance company may be authorized by the company to waive orally the requirements of the policy as to proofs of loss, although the policy itself provides that no officer, agent, or representative of the company shall be held to have waived any of the conditions of the policy unless the waiver is in writing, indorsed thereon as the requirements as to writing may itself be waived by the company.—*Idem*.
15. **PLEA AND PROOF**—*Proof of Loss*—The fact that plaintiff, after the expiration of the time allowed, attempted to make proof of loss, does not affect his right to recover on a plea that such proof was waived.—*Idem*.
16. **Warranty**—*Fraud*—A condition of a policy of insurance limiting the total insurance to three-fourths of the cash value of the property, is not a representation of warranty, and the policy is not avoided by innocently exceeding the limit.—*Idem*.

INTENT—See CRIM. LAW, 4.

INTEREST—See USURY, 3.

INTERROGATORIES—See PRACT. 43, 44.

INTERVENTION—See PRACT. 36.

JOINDER OF CAUSES—See PRACT. 27.

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JUDGM.

JUDGMENTS—See FRAUD. CONV. ²; PRACT. SUP. CT. ³, ⁷.

1. **Assignment of—*What Passes by***—Where a landlord's attachment is issued, and the property of the tenant is seized, and judgment is rendered for the landlord, on assignment of the judgment, all right of the judgment creditor to recover damages against the sheriff for negligence in the care of the property seized, passes to the assignee.—*Citizens National Bank v. Loomis*, 266.
2. **Foreclosure—PERSONAL JUDGMENT**—In foreclosure sustained.—*Philadelphia Mortgage & Trust Co. v. Stuart*, 751.
3. **Setting Mechanic's Lien Judgment Aside—PERSONAL JUDGMENT ON DEFAULT—*Notice***—It appears that an unmarried man contracted for material to build a house, and, thereafter, married. A petition to foreclose was filed, husband and wife were made parties, notice was served on both that a personal judgment would be taken as to both, but the petition stated no fact authorizing such a judgment against the wife. One was, however, taken against her, on default, and counsel for plaintiff, knowing that the petition did not warrant it, drew and had signed a decree giving personal judgment against the wife. She did not discover this until it was too late to set the judgment aside, at law, under Code, 8157. *Held*, there was no jurisdiction to render such personal judgment, and it was proper to vacate the judgment against the wife, under Code, 8154, which authorizes relief for irregularity in obtaining judgment, or fraud practiced by the successful party.—*Larson v. Williams & Bittenbender*, 110.
4. **ORIGINAL NOTICE TO OFFICERS OF CORPORATIONS—*Setting Aside Personal Judgment Against Officer***—It is not an abuse of discretion to open a default judgment against S. on a note intended to be that of a corporation of which he was secretary, but which, on its face, through the omission of the word "by" before his name, was the joint note of himself and the corporation, though notice of the action was served on him as well as on the corporation; he having turned it over to the president, not noticing that a personal claim was made on him, and supposing that it related only to the corporation.—*Savings Bank & Trust Co. v. Swan*, 718.

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6. **Validity**—**JOINT DEFENDANTS**—*Husband and Wife*—A judgment for plaintiff, in a suit against husband and wife, on their joint note, is valid as to the wife, who, after appearing and filing an answer, withdrew the same, and made no further defense, though invalid as to the husband, who was not served.—*Kellogg v. Window*, 552.

JUDGMENTS—VACATION OF—See **NEW TRIAL**, ², ⁴.

JURISDICTION—See **CERTIORARI**; **DRAINAGE**, ⁴; **JUSTICE AND MAYOR**; **REFEREE**, ¹, ², ³.

JUROR—See **CRIM. LAW**, ⁴.

JURY DUTY—See **CRIM. LAW**, ²⁴.

JURY QUESTION—See **CRIM. LAW**. ²⁶₁, ²³, ²⁷; **NEGLIG.** ³, ⁴, ⁷, ⁸, ¹²; **PRACT.** ²⁶; **RAIL.** ³, ⁶, ¹⁰; **USURY**, ².

JUSTICE AND MAYOR.

CHANGE OF VENUE—*Appeal to District Court*—Code, section 506, provides, that the mayor of a city or town shall have the jurisdiction of a justice of the peace, "and the rules of law regulating proceedings before a justice shall be applicable to proceedings before such mayor." Section 4671 provides, that on application for a change of venue, a justice of the peace shall transmit the papers in the case, etc., to the next nearest justice in the township, and that, in case the next nearest justice is disqualified, the venue shall be changed to the next nearest qualified justice in the county. *Held*, that, where a change of venue is granted by a justice, it is error to send the case to a mayor who is nearer than the next nearest justice; and the jurisdiction of the mayor may be reviewed on appeal to the district court, from a conviction in mayor's court.—*State v. Jamison*, 843.

LACHES—See **PRACT.** ²¹; **RESCISSIION**, ¹.

LANDLORD AND TENANT—See ESTOPPEL, ².

1. **Construction of Lease**—Under a lease of a building which fixes a certain rent and provides that the rent shall be a lesser sum until the landlord shall cause the premises to be heated by steam, there is no obligation to furnish the steam, except as a condition precedent to recovering the higher rental. Nothing is required, at all events, except sufficient heat to make the premises comfortable, and the burden of showing that this was not furnished, is on lessee.—*Gatch v. Garretson*, 252.
2. **AGREEMENT TO FURNISH HEAT**—Defendants leased a portion of a building for use as a lodging house, the building to be heated by steam, by the lessor. Experts testified that the

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radiation provided by the lessor was sufficient to keep the rooms comfortable for sleeping purposes, and it appeared that other tenants in the same building received sufficient heat. *Held*, that the evidence justified the finding that the lessor had substantially complied with the obligation to heat the leased premises.—*Idem*.

3. **FORFEITURE**—Effect is to be given to both the written and printed provisions of a contract, where they are consistent with each other, and a printed clause in a lease, providing that a failure on the part of the lessee to perform any of the covenants therein contained, shall authorize a re-entry and recovery of the premises by the lessor, applies to a written provision that the lessee shall pay all taxes on the property before they become delinquent, although a written provision as to forfeiture for certain breaches might not, if considered alone, be held to refer to such agreement.—*Heiple v. Reinhart*, 525.
4. **Forcible Entry and Detainer**—**PEACEFUL POSSESSION**—*Notice to Quit*—Under Code, section 3621, providing that "thirty days peaceable and uninterrupted possession, with the knowledge of the plaintiff, after the cause of action accrued," shall be a bar to an action for forcible entry and detainer of property, the service of notice to quit, required by section 3614 to be made three days before the commencement of an action, within thirty days after default of a lessee, is not an interruption of the lessee's peaceable possession, and, unless the action itself is commenced within the thirty days it is barred.—*Idem*.
5. **Construction of Statute**—The "knowledge of the plaintiff," referred to in Code, section 3621, is the knowledge of the defendant's possession, and not of the fact that a cause of action to terminate possession has accrued.—*Idem*.

LAND SALE COMMISSIONS—See CONTRACTS, 4, 5, 9, 10, 11.

Contracts—A real estate broker is not entitled to commission under an agreement to allow him all he can obtain for property over a specified amount, where he neither completed a sale nor negotiations for a sale, in compliance with the authority conferred by the principal, although the broker has been

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LEVY—See MORTGAGES, ¹.

Notes in Locked Safe—A levy on a safe, which is locked, and its contents, described in the return as "notes and money and books," is a good levy on notes payable to the execution defendant, contained in the safe.—*Smith v. Clark*, 605.

LEX FORI—See RAIL. ¹.

LEX LOCI—See RAIL. ¹.

LIBEL.

PRIVILEGE—Information Filed—An information filed with the board of insane commissioners, charging a specified person with being a fit subject for custody and treatment in the insane hospital, is not privileged, unless the informant acted in good faith, upon probable cause and without malice.—*Comfort v. Young*, 627.

LIENS—See ESTOPPEL ¹; MECH. LIEN; MORTGAGES, ¹; TAX ¹.

LIMITATION OF ACTIONS—See CRIM. LAW, ², ESTATES, ¹, ².

1. **Adverse Possession—COLOR OF TITLE—*Husband and Wife***—A quit-claim deed by a husband to his wife, of land held by him under a contract for its purchase, which, to her knowledge, has become subject to forfeiture because of his non-performance, is insufficient to vest her with color of title on which to rest a claim of adverse possession, based on husband and wife's going into possession, as against the other party to the contract of purchase of his successors, though she paid for the assignment made to him, with her separate property.—*Laraway v. Zenor* 181.
2. **Discovery**—A suit to rescind for mistake is not barred by limitations, though not brought within the statutory time, if plaintiff did not discover the mistake until one month before bringing the suit.—*Clapp v. Greenlee*, 586.

LIQUOR INJUNCTION—See NEW TRIAL, ¹, ⁴.

MANSLAUGHTER—See CRIM. LAW, ² ¹.

MASTER AND SERVANT—See NEGLIGENCE, ¹, ².

1. **Fellow Servant**—The mere fact that one employe had authority over others, does not make him a vice-principal, or superior, so as to charge the master with his negligence, in a matter which it was not the employe's duty to attend to.—*Newbury v. Manufacturing Co.* 441.
2. **Duty to Minor Employe**—The rule of law, that the master is not liable to the employe for injuries, for improperly using, for one kind of work, for which proper machinery is furnished,

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machinery proper and sufficient for other work, has no application where such improper use is made by a minor employe, by order of a vice-principal who fails to explain that the machine is not the proper one for that kind of work.—*Idem*.

3. INJURY TO MINOR EMPLOYEE—In an action for injuries while performing work more hazardous than that for which a minor was employed, an instruction that the defendant was liable if he put plaintiff at more hazardous work than that for which he was employed, without explaining the dangers incident thereto,—which instruction fails to limit the rule given it to those dangers of which the master knew, or had reason to believe, plaintiff was ignorant, and which were not so obvious as that, with care, they could have been known to plaintiff,—is erroneous.—*Idem*.
4. SAME—The rule that an employer who furnishes a proper machine is not liable to a servant injured by it while using it for an improper purpose, does not apply in the case of an injury to an inexperienced employe, who was using the machine in obedience to the directions of a superior whom it was his duty to obey.—*Idem*.
5. Order From Superior—*Mistake*—A master is not liable for injuries to a servant caused by orders received from another, because the servant believed that he had been told to obey such orders, if such belief was not founded on fact.—*Idem*.

MECHANIC'S LIEN.—See JUDGMENT, 2.

1. CONTRACT—*Ratification by Wife*—The fact that a wife knew that materials purchased by her husband on credit from plaintiff were used in her house, does not amount to a ratification of the husband's acts, where it is shown that the wife furnished the husband with money to pay for all purchases made for her house, and had no knowledge that any were made on credit.—*Young v. Swan*, 323.
2. PAYMENT BY WIFE—*Application on Husband's General Account*—Where a wife furnished the husband with money to buy lumber for her house, and he purchased the same with such money from the plaintiff, with whom he had a general

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TO

NEGLIGENCE

at least, until he has paid the bill, as the parents are primarily liable therefor.—*Newbury v. Manufacturing Co.* 441.

MISCONDUCT—See PRACT. ²², ²³, ²⁴; NEW TRIAL, ¹, ²; PRACT. SUP. CT. ¹⁰.

MODIFICATION—See CONTRACTS, ⁴.

MORTGAGES—See ESTOPPEL, ²; GEN. ASSIGN. ²; TAXAT. ⁴, ⁵.

1. Foreclosure of Chattel Mortgage—*Construction of*—A chattel mortgage provided that it should be void upon payment of the notes secured, according to their tenor. It also gave the mortgagee authority to take possession at any time, whether the debt was due or not, and to "sell at public auction sufficient of the same to pay the debt." *Held*, while the mortgagee might take possession at any time, he could not sell until the mortgage debt or some part of it became due.—*Koster v. Seney*, 558.
2. Proceeds—ASSIGNMENT—Where mortgaged chattels are sold by the mortgagor at public sale, and by agreement between him and mortgagee, the notes taken at the sale are, at the time, put in the hands of the clerk of the sale for the mortgagee, it amounts to an assignment of the notes to the latter.—*Wood v. Duval*, 724.
3. LEVY—*Lien*—Where a mortgagee permits the sale of mortgaged property, and that notes may be taken for the same in the name of the mortgagor, it being agreed that said notes shall be applied on the mortgage debt, he has no lien on the notes, as against a creditor of the mortgagor, who levies upon them while in the latter's possession, without notice of such agreement.—*Smith v. Clark*, 605.

MUNICIPAL CORPORATIONS—See INSTRUCT. ²; NEGLIGENCE, ¹, ², ¹¹, ¹²; OFFICERS, ¹, ²; PRACT. ²¹, ²².

NOTICE OF INJURY—*Statute of Limitations*—Under Acts Twenty-second General Assembly, providing that no suit shall be brought for personal injuries against a city, after six months from the time of the injury, unless notice shall have been served on the city within ninety days from the injury, an action therefore may be brought at any time within the general statutory limitation of two years, when such notice was served.—*Robinson v. City of Cedar Rapids*, 662.

MURDER—See CRIM. LAW, ²⁰, ²⁰, ²¹, ²², ²³, ²⁴, ²⁵.

NEGLIGENCE—See MASTER AND SERVANT; RAIL. ², ⁹, ¹⁰, ¹¹, ¹², ¹⁴.

- . Defective Street—Where, on the breaking of a water pipe, a plumber is employed by a lot owner to repair it, and makes

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NEGLECTANCE Continued

an excavation in the street without any permit from the city, and the officers of the city have no actual notice of the excavation, and a person, at about twilight, drives into the excavation, while the laborer has necessarily absented himself from the work, for a few minutes, the city is not liable.—*Jones v. City of Clinton*, 883.

2. **Fellow Servant**—An employe operating a machine in defendant's machine shops, is a fellow servant of a machinist engaged in placing shafting, though the same foreman did not have control over them.—*Trcka v. B., C. R. & N. R'y Co.* 205.
3. **Jury Question**—As plaintiff was driving across F. street defendant's horse, driven to a buggy on F. street, collided with plaintiff's buggy. A city ordinance provided that no person should drive on any street faster than six miles per hour. Defendant and two other persons driving single horses, were nearly abreast, racing their horses. Defendant and his wife, who was with him, testified that he was not racing, but, while driving at an ordinary gait, the other two horses came up behind him, frightened his horse, and he could not hold him in; and that when he came to plaintiff's buggy he jumped or fell into the buggy, and crushed it. Two witnesses testified that defendant's horse did not jump, and one of them said he came "on the straight trot." Defendant's was a fast horse, and he and the owner of other fast horses were accustomed to speed them on F. street. *Held*, that whether the collision was a mere accident, and not the result of defendant's negligence, was a question for the jury.—*Osborn v. Jenkinson*, 482.
4. **SETTING FIRE**—*Facts Stated*—*Allen v. Barrett & Carlton*, 16.
5. **Master**—If the master furnishes suitable trestles and planking, for the erection of a scaffold, to enable a fellow servant of plaintiff to place shafting, plaintiff, who was at work near where the scaffold was erected, cannot recover for injuries received on account of a plank falling from the scaffold by reason of the failure of the fellow servant to fasten it, whereby it slipped because a ladder used to mount the scaffolding was placed against it, instead of the trestle, though the ladder was crooked, and was so placed because it stood firmer, where there were other ladders the servant could have used, which were in perfect order.—*Trcka v. B., C. R. & N. R'y Co.* 205.
6. **CONTRIBUTORY NEGLIGENCE**—One who employs another, having an engine and threshing machine, to thresh for him, is not guilty of such contributory negligence as to bar recovery for a loss of his stacks through a fire due to the negligence of the employes of the owner of the engine, in not having it

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Negligence Continued

- provided with proper spark arresters, because he, in ignorance of such fact designated a place for the setting up of the engine, which is actually dangerous, but which such employes assure him is safe.—*Richardson & Bell v. Douglas*, 289.
7. *Jury Question*—It appeared that plaintiff was a dairyman; that he had stopped at a store on the corner; that he had gotten into his buggy and started across the street, driving in a proper manner; that one or more persons called out to him to look out for the race; and that he had no time to get out of the way. *Held*, that whether he was guilty of contributory negligence, was a question for the jury.—*Osborn v. Jenkinson*, 432.
 8. *Same*—Contributory negligence is a question for the jury, where plaintiff came out of a lighted store, and, in trying to cross a dark alley by its side, stepped from the curb upon a slanting and ice-covered apron with worn and broken cleats thereon, the top of which commenced six inches below the curb, which facts were not known to plaintiff, though he had for a long time worked within a short distance of the defect, and knew that the walk was above grade.—*Robinson v. City of Cedar Rapids*, 663.
 9. *Minority*—An instruction that plaintiff's minority could be considered only upon the question whether or not one of his age, experience and intelligence could, and did, know and appreciate the dangers incident to the work, is proper.—*Newbury v. Manufacturing Co.* 441.
 10. *Same*—An instruction that the jury may consider plaintiff's minority in determining whether he had intelligence enough to appreciate the dangers that were involved in the employment in which he was engaged, and that they might also consider his age in determining whether or not he was guilty of contributory negligence, is not objectionable, as tending to hold defendant liable because plaintiff's minority made one under whose direction he was working, a vice-principal —*Idem*.
 11. *Sidewalk*—One unacquainted with an alley crossing has the right to rely on its being in a reasonably safe condition and is not bound to anticipate that there is a drop at the end of the sidewalk of six inches, and from that point a slanting apron with cleats which are old and worn and partly removed, and which apron is made slippery by the accumulation of snow and ice.—*Robinson v. City of Cedar Rapids*, 663.

NEGLECTANCE Continued

TO

NEGO. INST.

12. *Same*—JURY QUESTION—Whether plaintiff, in an action against a municipal corporation, for negligently leaving, without proper guards, an opening in a sidewalk near which he was standing while talking to a friend, was guilty of contributory negligence in stepping backwards into the opening, to get out of the way of a passing pedestrian, is a question for the jury, to be determined under all the circumstances attending the accident.—*Lichtenberger v. Town of Meriden*, 221.
13. *Special and General Verdict*—A general verdict for plaintiff for injuries caused by failure of a locomotive approaching a highway to give signals at the distance therefrom required by Acts Twentieth General Assembly, chapter 104, section 1, whereby plaintiff's horse approached near the railroad, and became frightened, is not overcome by special findings that plaintiff did not look, or listen, for a train before reaching an opening, one hundred and thirty-four feet from the railroad, in a hedge extending along the side of the highway, and that there was a place between such opening and plaintiff's house (the distance not being shown), at which plaintiff could have known of the approach of the train, if she had looked and listened.—*Case v. C., M. & St. P. Railway Co.* 487.
14. *Using Elevator*—Plaintiff, a boy of eighteen, who was employed in a building in which there were two elevators, one of which was used for passengers, and had regular attendants, employed by the owner of the building, while the other had no attendants, and was seldom used, rather than to wait for the elevator in use, went into the other and used it by operating it himself, and in so doing was injured by reason of its being out of repair. He had frequently used it in the same way before, but, without permission, and, so far as shown, without the knowledge of the owner. *Held*, that plaintiff was guilty of contributory negligence, and could not recover of the owner of the building.—*Hansen v. State Bank Building*, 672.

NEGOTIABLE INSTRUMENTS—See PRACT. 22.

1. Good Faith Purchase of Note. Payment of Note. Title.

NEGOT. INSTR. Continued

TO

OFFICE AND OFFICERS

same before maturity, corroborated by the testimony of the treasurer of the payee—*Idem*.

8. **Notice to Purchaser of Note—SIGNATURE BY OFFICER OF CORPORATION**—A purchaser of a note signed in the name of a corporation by "W. E. H., president, F. C. S., secretary and treasurer," has sufficient notice to put a purchaser of a note on inquiry as to whether the secretary intended to personally bind himself, thereon.—*Savings Bank & Trust Co. v. Swan*, 718.

NEW TRIAL—See CRIM. LAW, ², ³; JUDG. ³, ⁵; PRACT. SUP. CT. ¹⁷.

1. **Misconduct of Jurors**—In the absence of a showing that prejudice resulted, a new trial should not be granted plaintiff, because the jurors, while viewing the premises involved, asked plaintiff questions about the case, which questions amounted, simply, to a speaking aloud of the juror's thoughts, no reply being made to such questions, and no one talking to the jurors.—*Foedisch v. C. & N. W. Ry Co.* 728.
2. **KNOWLEDGE OF MISCONDUCT BEFORE CLOSE OF TRIAL—Estoppel**—A party, who, knowing before the conclusion of the trial, of misconduct of the jury, proceeds without objection, cannot have a new trial by reason thereof.—*Idem*.
3. **Setting Judgment Aside—Fraud of Successful Party—Power of Sheriff in Liquor Injunction Suits Not Brought by Him**—Under Code, section 1551, making it the duty of peace officers to execute the liquor law, and to make complaint on being informed of its violation, a sheriff is a representative of the state in actions under such law, only, where he is complainant; and in civil action for an injunction, commenced by the county attorney on behalf of the state, statements made by the sheriff to the defendant, which induced such defendant to make default, do not constitute fraud on the part of the successful party, authorizing a vacation of the judgment.—*Seddon v. State of Iowa*, 378.
4. **Unavoidable Misfortune**—Where a defendant failed to appear and defend an action by the state, in reliance on statements made by the sheriff, who had no authority to bind the state as plaintiff; such facts do not constitute unavoidable misfortune, preventing a defense, which will support an action to vacate the judgment.—*Idem*.

NOTES AND BILLS—See CORP. ⁷.

NOTICE—See 854; ACKNOWLEDGMENTS, ²; ATTACH. ³, ⁴, ⁵; JUDG. ³; MUN. CORP.; NEGOT. INSTR. ²; PRACT. SUP. CT. ¹¹.

NOTICE OF EVIDENCE—See CRIM. LAW, ⁴⁰.

NUISANCE—See PRACT. ²⁷.

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NUNC PRO TUNC ORDER—See CRIM. LAW, 7.

OBJECTIONS—See EVID. 1; PRACT. SUP. CT. 12, 13, 14, 17, 18, 19, 20, 25;
SCHOOLS, 2.

OFFER TO COMPROMISE—See PRACT. 20.

OFFICE AND OFFICERS—See PRACT. 47.

1. **Term of Office**—Acts Twenty-second General Assembly, chapter 1, provides, that in every city containing thirty thousand inhabitants, a board of public works shall be established, consisting of two members, to be appointed by the mayor, one for a term of two, and the other for a term of three years, to hold office until their successors are duly appointed and qualified; that their successors shall be appointed for three years; and that the mayor shall fill all "vacancies" in said board, by appointment. *Held*, that the terms of office began when the first appointments were made, and ended, one in three, and the other in two years, and the term of office of subsequent incumbents terminated every three years, dating, respectively, from the termination of the term of the office of the original incumbents.—*Sherman v. City of Des Moines*, 88.
2. **SAME—Elective and Appointive Officers**—Acts Twenty-third General Assembly (March 13, 1890), for the extension of the limits of certain cities, provides (section 5), for elections biennially of "all elective officers for terms and in manner provided by law for cities of the first class," that "said officers" shall qualify as provided by law, and that the terms of office of "all officers in office prior to said election, shall cease and determine upon the organization of the new city council so elected;" and, by section 6, all acts and parts of acts inconsistent with it are repealed. *Held*, that the provision that the terms of office of "all officers in office prior to said election shall cease," etc., applies only to elective officers, and not to appointive officers, whose appointment is authorized by acts not inconsistent with it.—*Idem*.

OPINION EVIDENCE—See EVID. 12, 13, 14, 15.

ORIGINAL NOTICE—See INSUR. 4.

PARENT AND CHILD

TO

PLEAD.

PARENT AND CHILD—See **CONTRACTS**, 4; **FRAUD**, 2.

1. **Services by Child**—*Presumptions as to Compensation*—Before a son can recover for services rendered to his father, while a member of his father's family, he must rebut the legal presumption that such services were rendered gratuitously, by satisfactory evidence.—*Enger & Co. v. Lofland*, 803.
2. *Same*—*Evidence*—On the issue of a father's liability for wages for services rendered by a son while a member of the family, the presumption that such services were rendered gratuitously and the father's denial of any agreement to pay wages, are not overcome by the son's testimony and a book kept by him without his father's knowledge, which showed that accounts had been altered, that the entries were not made at the time they purported to be, and that the memoranda of alleged settlements were made at one time.—*Idem*.
3. **Undue Influence**—*Evidence*—*Deeds*—Inference of undue influence from the fact of an aged parent's conveying all his property to two children, with whom he lived, is overcome by evidence that he stated to a lawyer what he wanted, saying that he did not want to make a will, and did not need to make a provision for future support, as he could trust his children; that after executing the deed, he gave it to his daughter, and requested her to record it; that thereafter, to an assessor and others, he explained the matter and said that he wanted the grantees, who had been very good to him, to have the property for taking care of him; and that he objected to the marriage contracted by the child not provided for, and believed her husband to be a drunkard and a spendthrift.—*Chambers v. Brady*, 622.

PARTIES—See **PRACT.**, 20.

PARTNERSHIP—See **INSUR.**, 3, 9.

PASSENGERS—See **RAIL**, 1, 2, 4, 5, 6.

PAYMENT—See **MECH. LIEN**, 2.

PERJURY—See **CRIM. LAW**, 41, 42.

PERSONAL JUDGMENT—See **JUDG.**, 2.

PERSONAL PROPERTY—See **TAXAT.**, 4.

PETITION AND REMONSTRANCE—See **HIGHWAYS**, 2.

PIERS.

Riparian Rights—A riparian owner on a navigable lake has the right to construct a pier below high water mark if he conforms to the regulations of the state, and does not interfere with the right of navigation.—*Mills & Allen v. Evans & McCutchin*, 712.

PLEADING—See **INST.**, 6, 7; **INSUR.**, 12; **PRACT.**, 2, 4, 5, 14, 15, 40; **PRACT. SUP. CT.**, 20; **RAIL.**, 15.

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PLEAD. Continued

1. **Amended Petition—REPETITION**—The original petition in an action, under Code, section 212, for collusion on the part of an attorney with intent to deceive a court or party, alleged that defendant colluded with his client to interpose a fictitious counter-claim in an action before a justice, so as to enable the client to appeal, and that the case was appealed and expenses incurred by plaintiff on the appeal, but did not allege that defendant appeared for his client, on appeal. A demurrer was sustained on the ground, that it did not show that the expenses incurred by plaintiff were caused by defendant's conduct. The amended petition alleged that defendant appeared for his client in the trial, on appeal. *Held*, that it was error to strike out the amended complaint as a mere repetition of the original.—*Orphie Krause v. Lloyd*, 666.
2. **Construction of—ISSUE TENDERED—*Replevin***—A petition in replevin alleged that a separator sold by plaintiff under a contract whereby the purchaser was to hold the same or its proceeds in trust for plaintiff, subject to his order, was claimed by defendant under a chattel mortgage from the purchaser, and that defendant did own the property; but there was no allegation as to value, or that plaintiff had demanded or was entitled to possession of the property, and no attack was made therein on the validity of defendant's mortgage. *Held*, that the claim that defendant took the mortgage with actual notice of plaintiff's contract, and that the description of the property was inserted after the mortgage was fully executed and acknowledged, was not in issue.—*Creamery Mfg. Co. v. Union Bank*, 370.
3. **Demurrer—*Admission by***—While the facts alleged in a pleading which was demurred to, must for the purpose of the demurrer, be taken as true, only such facts as are well pleaded, will be deemed to be admitted.—*Peatman v. Light, Heat and Power Co.* 245.
4. **General Denial—*Issue Upon***—The right of a foreign administratrix to sue in Iowa without having qualified there, is not in issue where a general allegation of plaintiff's capacity is met by a general denial, merely, instead of an averment of the facts relied on to show her want of capacity, as provided by Code, section 2717.—*Sparks v. Accident Association*, 458.
5. **Ultimate Facts**—A pleader may state ultimate facts, and is not required to state the evidentiary facts from which the ultimate facts follow, hence he need not so state his facts as

PLEAD. Continued

TO

PRACT.

6. *Same*—An answer alleging, as a breach of warranty, that the machine, "with proper management, would not and could not and did not do as much, or as good work, as other machines of similar size for the same purpose," is not bad, as alleging legal conclusions.—*Idem*.
7. **Waiver by Pleading Over**—*Overruling and Sustaining Demurrer*—Plaintiff, by amending after demurrer is sustained to the complaint, waives the right to appeal from the order sustaining the demurrer; and Acts Twenty-fifth General Assembly, chapter 96,—providing that answering over after a demurrer is *overruled*, does not make the ruling on the demurrer and adjudication on any question raised by the demurrer,—does not change the rule as to waiver by answering over after demurrer is *sustained*.—*Krause v. Lloyd*.

PLEA AND PROOF—See INSUR. ¹⁵.

NOTICE—Under an allegation that plaintiff had full knowledge of a certain contract, and was thereby estopped to assert a claim in opposition thereto, defendant may prove either direct notice, or facts from which knowledge may be inferred.—*DeLay v. Carney Bros.* 687.

PRACTICE—See CERTIORARI, CRIM. LAW, ^{17, 22}; ESTATES, ⁵; EVID. ^{22, 20}; FRAUD. CONV. ^{3, 4}; INSTRUCT. ^{1, 6, 7}; INSUR. ¹⁵; PLEAD. ^{1, 7}; PLEA AND PROOF; PRACT. SUP. CT. ¹²; RAIL. ⁸; RESCISSION, ^{1, 1, 2}.

1. **Amendment in Trial**—An answer stated that plaintiff had transferred his cause of action to his attorneys, and was not the real party in interest. The reply denied any assignment except as security for attorney's fees, and averred that such assignment was after action brought. *Held*, that an amended reply filed at the trial, containing only a denial, did not present a new issue.—*Kreger v. Sylvester*, 647.
2. **Discretion**—Even if the last reply presented a new issue, the trial court did not abuse its discretion in allowing it to remain on file.—*Idem*.
3. **REFUSAL TO PERMIT**—Where the complaint in an action on a subscription sets out a copy of the instrument and the answer admits the signing of "a paper similar to the one set out in the petition" but states that defendant has no knowledge as to whether the one set out is the one signed, and plaintiff thereafter puts in evidence the original subscription list signed by defendant; it was error to refuse to allow defendant to amend the answer by denying that it signed

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- the alleged subscription paper, or that the signature thereon is its signature, on the ground that the original answer admitted such signature, though the proposed amended answer did not deny that the paper was not executed "for" defendant.—*Fair Association v. Hornick*, 578.
4. **EXEMPLARY DAMAGES**—A petition in an action for assault and battery may be amended so as to ask for exemplary damages on facts set forth in the original petition.—*Kreuger v. Sylvester*, 647.
 5. **HARMLESS ERROR**—Where a petition laid damages at five thousand dollars, and asked judgment for ten thousand dollars, errors in instructing that plaintiff could not recover exceeding ten thousand dollars, and in allowing the petition to be amended, after verdict, by laying the damages at ten thousand dollars, were harmless, where the court subsequently reduced the verdict to five thousand dollars.—*Newbury v. Manufacturing Co.* 441.
 - 5a. *Remittitur—Compelling*—Under such circumstances, the trial court may, in its discretion, require the plaintiff, in an action for personal injuries, to remit part of the verdict.—*Newbury v. Manufacturing Co.* 441.
 6. *Same*—In an action at law, aided by an attachment levied in July, 1894, a refusal to allow plaintiff to file an amendment claiming interest on his account from January, 1895, was harmless, where the jury found that plaintiff's claim was liquidated by the damage resulting to defendant from the attachment.—*Union Mill Co. v. Prenzler*, 540.
 7. **Assignment of Action—Abatement**—An assignment by plaintiff of his cause of action to his attorneys as security for their fees, after the commencement of the action, will not prevent the action from continuing in the name of the original plaintiff.—*Kreuger v. Sylvester*, 647.
 - 7a. *Harmless Error*—If this ruling was erroneous, it was harmless, since the assignment was not absolute, but merely a contract for contingent fees.—*Kellogg v. Window*, 552.
 8. **Attorney Fee—ATTACHMENT**—Where the defendant, in an

PRAC. Continued

where such defense tended, merely, to show the wrongful issuance of the attachment.—*Idem*.

10. **Certiorari—REFUND OF TAX**—Under Code, section 322, providing that on *certiorari* the court may merely give judgment affirming or annulling the proceedings, or correcting the same, and directing further proceedings, *certiorari* would not furnish adequate relief to a school district against proceedings by the board of county supervisors in refunding a tax collected for the benefit of the school district, where the money had been actually refunded, and the tax payer had no money in the hands of the county officers. *Certiorari* lies only where there is no other plain, speedy, or adequate remedy, and in this case, a suit in equity for the recovery of a trust fund is such remedy.—*Independent District Ottumwa v. Taylor*, 617.
11. **HIGHWAYS**—The proceedings of township trustees, under Acts Twentieth General Assembly, chapter 200, section 4, authorizing a consolidation of all the road districts in a township into one highway district, on proper petition therefor, are judicial in their nature, and, therefore, subject to review on *certiorari*, under Code, section 3316, when the trustees have exceeded their jurisdiction.—*Dunham v. Fox*, 131.
12. **Change of Venue**—See *post* ⁴⁶—The court in its discretion, may properly deny an application for a change of place of trial on the ground of prejudice, where the affidavits tending to show prejudice are met by an equally large number of counter-affidavits tending to show the contrary, and, if there is any difference in the statements, it is in favor of those made for the party contesting the motion.—*Union Mill Co. v. Prenzler*, 540.
13. **Collateral Attack of Sale**—In an action to cancel a judgment and a levy on a sale of land, it appeared that such judgment had been satisfied by a previous sale of land, under an execution on it, and the second sale was void. It was asked that the judgment be renewed, and made a lien on the land, and that the sheriff be ordered to resell the land, if the court found the second sale void. *Held*, that defendant was not entitled to the relief asked, even if the allegation of the answer was true, without proceedings to set the first sale aside.—*Harpham v. Worthington*, 818.
14. **Consolidation—LAW AND EQUITY—Waiver by Pleading**—An action at law and a suit in equity for the collection of rent were consolidated as a cause in equity, with a proviso that the consolidation should not prejudice the defendants' right to a

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jury trial upon the matters set out in his answer to the law action. A substituted petition asking equitable relief in the law action was filed, and after the consolidation, defendants filed an amended and substituted counter-claim, triable in equity. *Held*, that it was not error to refuse to permit the trial of the issues by the jury. Where an issue ordinarily triable at law, is presented by answer to an action properly commenced in equity, plaintiff is entitled to have it tried, as in equity.—*Gatch v. Garretson*, 252.

15. **Decree—WHO MAY BENEFIT BY—*Pleading***—A creditor who has not pleaded fraud as to a note given to a third person, which, with his own, was secured by a chattel mortgage from the common debtor, cannot claim the benefit of a decree which, as between other parties and the payee of the note, found the note and the mortgage *pro tanto* fraudulent.—*Enger & Co. v. Lofland*, 303.
16. **Default Judgment—*Fraudulent Conveyance***—A judgment should be rendered against a chattel mortgagor, on a cross-petition by a second mortgagee in an action to foreclose the prior mortgage, where the mortgagor makes no defense, although the second mortgage is found to have been executed with the intent to defeat the mortgagor's creditors.—*Hartney v. Jordan*, 646.
17. **Directing Verdict**—A motion to direct a verdict should be sustained if, considering all the evidence, it clearly appears that it would be the duty of the trial judge to set aside a verdict if found in favor of the party upon whom the burden of proof rests, and against whom the motion is directed.—*Hurd & Wilkinson v. Neilson*, 555.
18. **Election of Remedies—*Fraud and Mistake***—The beginning of an action for fraud in an exchange of land is not an election to affirm the contract, which will prevent plaintiff, on subsequently discovering that there was no fraud, but a mistake as to the tract which he was to receive, from amending the complaint so as to seek a rescission for such mistake.—*Clapp v. Greenlee*, 586.

PRACT. CONTINUED

- recoverable in the case, where no evidence of the value of his time is offered, and no reference is made thereto in the instruction stating what can be allowed as damages.—*Citizens State Bank v. Rowley*, 686.
21. **Highways**—See *ante*, ¹¹; *post*, ⁴⁸.—*Objections*—The erroneous admission of testimony that the witness had her attention called to a defective sidewalk by falling thereon, is without prejudice, where she was afterwards permitted, without objection, to tell how, when, and where she fell.—*Robinson v. City Cedar Rapids*, 662.
 22. *Same*—The erroneous admission of evidence that changes were made in a crossing after an accident thereon, which the court afterwards instructed the jury not to consider, is not prejudicial where the necessity for repairs and alteration was evident.—*Idem*.
 23. **EXHIBITS TO JURY ROOM**—While an admission in the pleadings, of the execution of a note sued on, does not authorize the court to permit the jury to take the note to their room, unless it is introduced in evidence, yet the fact that it is so taken is without prejudice, where a copy of it is set out in the pleadings which the jury may properly take.—*State Bank of Tabor v. Brewer*, 576.
 24. **REMARKS OF JUDGE**—A statement by the court, in an action for assault and battery, in reply to a statement by defendant's attorney that a mechanic might resist to any extent before allowing an article left with him for repair to be taken before payment for such repairs, that a person could not go to the extent of killing a man to protect a small claim, is not prejudicial to defendant.—*Kreger v. Sylvester*, 647.
 25. **VERDICT**—A statement by the court of issues leading the jury to return a verdict on a counter-claim for both defendants, when it should be in favor of one only, is not prejudicial to plaintiff.—*Citizens State Bank v. Rowley*, 686.
 26. —**TRANSFER TO EQUITY**—A motion by the intervenor to transfer the cause to the equity docket for trial, is properly denied where the action was properly commenced at law, and the relief asked by plaintiff was within the jurisdiction of the court of law, only part of the relief asked by intervenor is of an equitable character, and where the transfer would delay the main action.—*Kassing v. Ordway*, 611.
 27. **Joinder of Causes**—**EQUITY JURISDICTION**—In a suit by a county to correct a description in a deed of land conveyed to it for a road, injunction against obstruction of the highway may be also sought and had, though there be a remedy at law therefor, by abatement of nuisance, or though defendant be

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- punishable criminally for the obstruction.—*Clayton County v. Herwig*, 631.
28. **Joint Demurrer**—**ACTION AGAINST SHERIFF AND ATTACHING PLAINTIFF**—When an action is brought against the sheriff for levying an attachment upon the property of a third person and jointly against the plaintiff for directing the levy, a demurrer interposed by the defendants jointly, on the ground that no sufficient notice to release was given, should be overruled, for no notice at all is required to recover of the attaching plaintiff.—*Bradley v. Miller*, 169.
29. **Judgment—Validity**—**JOINT DEFENDANTS**—*Husband and Wife*—A judgment for plaintiff, in a suit against husband and wife, on their joint note, is valid as to the wife, who, after appearing and filing an answer, withdrew the same, and made no further defense, though invalid as to the husband, who was not served.—*Kellogg v. Window*, 552.
31. **Laques**—**ESTOPPEL**—A delay of nearly four years in taking any steps to cancel a deed, after the grantor knows that it has been handed to grantees, and recorded by the latter without grantor's consent, will not bar an action to set it aside; nor will the fact that the grantor, in the interval, made statements insufficient as the basis of an estoppel, to the effect that he had no interest in the property, where he was over seventy years of age, and illiterate, and the grantees were his wife and sons.—*O'Connor v. O'Connor*, 476.
32. **Misconduct**—**COUNSEL**—*Opening Statement*—It is not reversible error for the attorney for the prosecution, in good faith, and with reasonable grounds to believe certain evidence admissible, to state to the jury, in his opening statement, the substance of such evidence, though, when offered, it is rejected.—*State v. Allen*, 7.
33. **IN ARGUMENT**—It is not error for the counsel for the state, in his argument to the jury, to state his belief in defendant's guilt.—*State v. Cater*, 501.
34. **MISCONDUCT OF COURT**—*Examining Witness*—The asking of questions of witnesses, in a criminal trial, by the court, in such manner and under such circumstances as to indicate to the jury the court's suspicion or opinion that the witness had been instructed by defendant or his attorney not to answer a certain question which the court required him to answer, is cause for reversal, where there was no foundation for such suspicion or opinion.—*State v. Allen*, 7.
35. **Objection After Answer**—An objection to questions asked defendant's mother as to an alleged conversation with the

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- county attorney about fixing the papers so that defendant might escape, comes too late, after the defendant has answered.—*State v. McKinstry*, 82.
86. **Offer to Compromise—JURY QUESTION—Evidence**—A conversation admitted in evidence, should not be withdrawn from the jury on the ground that it was in the nature of an offer to compromise, although the testimony of some of the witnesses shows that it was a mere offer to compromise, where the testimony of others shows that it contained unqualified admissions of indebtedness by the debtor, without anything to indicate that it was an offer to compromise.—*Kassing v. Ordway*, 611.
87. **Offered Instruction—Waiver by**—That an offered instruction which is denied, deals with the right to certain relief as being due, as matter of law, does not waive the privilege of having the right to such relief submitted, as a question of fact.—*Robinson & Co. v. Berkey & Martin*, 186.
88. **Order of Proof—Discretion**—Where, in an action on a purchase-price note by the holder, claiming to be a *bona fide* purchaser, for value, before maturity, defendant denies such claim, and defends on the ground of a breach of warranty in the sale, the court may admit evidence on the question of breach of warranty without first submitting to the jury whether plaintiff was a *bona fide* purchaser.—*Graff v. Adams*, 481.
89. **Parties—Notice**—It is not necessary to notify a school district of, or make it a party to an application to the county, made by one of the tax payers of the district to refund him school taxes paid, which application is based on the claim that he legally belongs to another district having a lower rate of taxation.—*Independent District Ottumwa v. Taylor*, 617.
40. **Reformation—Fraud**—A party to an oral contract, who, after its partial execution is induced, by fraud or mistake, to sign what purports to be a written memorandum thereof, but which in fact contains provisions not in the oral contract, need not ask for a reformation of the writing, but may disaffirm it, and stand upon the oral agreement.—*Burlington Lumber Co. v. Lumber Co.* 469.
42. **Setting Aside Illegal Highway Order—ACTION BY TAXPAYER**—A taxpayer may maintain proceedings to set aside an illegal order of the township trustees, consolidating all the road districts in the township, although he would not be prejudiced by a legal consolidation.—*Dunham v. Fox*, 181.

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43. **Special Interrogatories**—Code, section 2808, providing that the jury must be required, on the request of a party, to find specially on questions of fact stated to them, in writing, does not require the court to submit interrogatories as to immaterial facts, or facts necessarily determined by the general verdict.—*O'Leary Brothers v. Insurance Co.* 390.
44. **SAME**—The refusal of special interrogatories is not ground for complaint, where the essential facts are embodied in another interrogatory which is submitted.—*Union Mill Co. v. Prenzler*, 540.
45. **Striking Testimony**—**POWERS OF AGENT**—*Written Contract*—An alleged special adjusting agent gave testimony tending to show that he had authority to orally waive proof of loss. No objection that he was acting under a written contract of employment was interposed, and the witness was dismissed. Plaintiff then gave evidence tending to show that said agent did orally waive proof. The agent then being recalled for further cross-examination, it appeared that he was employed in writing, and that the contract was in Illinois. It also appeared, inferentially, that the contract did not specify his duties, for the reason that he was to go to such places and do such work as should be directed by the manager *Held*:
a. As the testimony of the plaintiff was rightfully admitted, as the record stood at the close of the first examination of the agent, said testimony, subsequently elicited, did not authorize the striking of plaintiff's said evidence.
b. It does not appear that the writing deprived the agent of power to waive proof of loss, orally.—*O'Leary Brothers v. Insurance Co.* 390.
46. —**AGENCY**—*Construction of Statute*—A corporation operated a boat line in a given county, and had an agent therein who solicited freight and collected pay for it. An excursion, out of the ordinary course of the corporation's business, was run, and plaintiff was wrongfully landed in the progress of the excursion. *Held*, his action could not be brought under Code, 2585, in the county where the agent did said business of soliciting and collecting.—*King v. Blair*, 87.
47. **COLOR OF OFFICE**—*State Board of Health*—Said board, while in session at Des Moines, made an order denying a college future recognition. The investigation leading to this action was made in Lee county. Code, section 2579, authorizes

PRACT. Continued

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to recognize said college, must be brought in Polk, and cannot be maintained in Lee county.—College of Physicians v. Guilbert, 213.

48. **Verdict**—See—"GENERAL VERDICT" DEFINED—Separate findings upon each of two issues presenting separate causes of action are general verdicts, and unobjectionable.—Robinson & Co. v. Berky & Martin, 186.

PRACTICE SUPREME COURT.

1. **Abstracts**—The evidence cannot be considered on appeal where appellant's abstract does not state that it contains all the evidence, and there is no statement or certificate from the attorneys that it embraces any or all of the record on which the case was tried, though appellee files an amended abstract supplying some parts of the record, which denies that the two abstracts, together, contain all the evidence on any particular point.—Kreger v. Sylvester, 647.
2. **NEEDLESS COSTS**—The cost of an additional abstract, filed by appellee, will not be allowed where it was unnecessary, and there was no sufficient cause for filing it.—Mills & Allen v. Evans & McCutchin, 712.
3. **Amending Judgment on Appeal—Construction**—Where it is uncertain whether a judgment for defendant disposed of and included a certain item pleaded by way of set-off, but it is inferable therefrom that it did not, and the judgment is excessive if it is not included, but as near as may be just if it is included, the judgment will be amended on appeal so as to be a bar to further recovery for such item.—Walker v. Walker, 99.
4. **Certificate—ESSENTIALS—QUESTIONS INVOLVED**—Connor v. Bennke, 747.
5. **SAME—ESSENTIAL—DENIAL IN ABSTRACT**—Hiatt v. Nelson, 749.
6. **Consolidation—Presumption**—It will be presumed, on appeal, that judgment in but one case was rendered below, and this is so, though it is stated in the abstract that two cases were consolidated in the district court, where the only reference to a second case is found in the statement of one witness, who says that he bought goods of the plaintiff in the second suit and gave a note for it, which remains unpaid, and, in the caption of the record, which recites the title of both cases, in stating a submission to the jury.—Farwell Co. v. Zenor, 640.
7. **Demurrer—FROM RULING ON JUDGMENT**—An order sustaining a demurrer is appealable, even, though no final judgment is

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- entered upon it, or rendered by the court.—*Bradley v. Miller*, 169.
8. **SUSTAINING DEMURRER**—*One Ground Good*—Where a demurrer is sustained generally, the ruling will be sustained if any of the grounds of the demurrer are well taken.—*Krause v. Lloyd*, 666.
9. **Dismissal**—NOTICE.—*Brandenburg v. Keller*, 746.
10. **Misconduct**—*Proof on Appeal*—An assignment, on appeal, in a criminal case, that the court erred in not rebuking or denouncing the clapping of hands of the audience, claimed to have followed the conclusion of the argument of one of the counsel for the state, cannot be deemed well taken where the counsel for defendant swear that such act of the audience was not stopped or rebuked by the court or sheriff, but the sheriff states in his affidavit that he instantly checked the applause, and the clerk swears that both the court and the sheriff immediately stopped the clapping of hands, and the county attorney says it was at once stopped.—*State v. Cater*, 501.
11. **Notice on Co-defendant**—A motion to dismiss made by appellee because appellant's co-defendant was not served with notice of appeal, will not be passed upon when it is clear that there should be an affirmance upon the merits.—*Lillibridge v. Allen*, 582.
12. **Objection Below**—In a suit to set aside a judgment by confession, an objection to the form of the action, in that plaintiff's remedy was at law, cannot be raised for the first time on appeal.—*Bull v. Keenan & Sons*, 144.
13. **SAME**—An objection to a question, not interposed until after the answer, is not available, on appeal.—*State v. Cater*, 501.
14. **SAME**—An objection that a contract for the conveyance of a homestead cannot be specifically enforced because the grantor's wife did not sign the contract, cannot be first made on appeal.—*Wilson v. Riddick*, 697.
15. **SAME**—The admission of the testimony of a witness who is permitted to use a memorandum to refresh his recollection, is not rendered erroneous because he shows, on cross-examination, that he has no independent recollection of the

PRAC. SUP. CT. Continued

17. **GENERAL AND SPECIFIC**—An objection to the admission of part of the eptries on an exhibit, the remainder of which are admissible, is not available, on appeal, where the only objection was to the entire exhibit, on the ground that it was incompetent, immaterial, and secondary.—*State v. Brady*, 191.
18. **INSTRUCTIONS—Request**—The judgment of a trial court in a criminal case will not be reversed for error in instructions, where objection was not made and exception taken at the time; nor for failure to give instruction, where no request for such instruction was made at the time, unless it appear that such failure deprived the defendant of a fair trial.—*State v. Hathaway*, 225.
19. *Same*—An objection made in a motion for a new trial, to a portion of a charge as given, is insufficient to raise the question as to whether the trial court erred in not giving an additional charge on the same subject, not asked, but to which the accused was entitled.—*Idem*.
20. **TRIAL DE NOVO—*Laws of Sister State***—An equity cause was set down for hearing on depositions. The court allowed defendant to introduce the statutes of Nebraska to show that the action was barred. It refused plaintiff leave to rebut this. *Held*, In view of the fact that plaintiff prevailed, and of the presumption that the court below did not commit error, involved in refusing such rebuttal, it will be the theory of the decision on appeal, that the offer of statutes was disregarded. If this be not so, this court, in view of the fact that rebuttal was not permitted, will exercise the right of excluding such evidence, even as the district court might have done, and this, though its admission below might have been discretionary.—*Clapp v. Greenlee*, 586.
21. **Refusal to Enter Default**—An appeal from the refusal of the court, upon the objection of defendant's attorneys appearing as *amicus curiæ*, to enter default in favor of plaintiff, will be dismissed where the record does not show the ground of the court's refusal, or that an answer was not on file.—*Roberts v. Malloy*, 37 .
22. **Review—CONFLICTING EVIDENCE**—*Craig v. Sylvester*, 753.
23. **DENIAL IN ABSTRACT—*Stipulation***—A stipulation for a submission of a case on appeal on the two abstracts filed, waiving a transcript, does not authorize the court to review questions of fact, when the additional abstract filed by appellee states that all the evidence is not contained in the abstract, which statement is not denied.—*Koster v. Seney*, 558.

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24. *Same*—The undenied averment in appellee's abstract, that all of the evidence is not before the court in the several abstracts, will be accepted as correct by the supreme court, and will prevent a consideration of any question depending upon the evidence. Therefore, refusals to strike evidence, sustaining objections to cross-interrogatories, and an assignment that the verdict is excessive, cannot be reviewed in that condition of the record.—*Farwell Co. v. Zenor*, 640.
25. **EQUITABLE ACTION**—A decree will be reversed where, eliminating evidence admitted over a good objection on the ground that it was incompetent, the evidence is insufficient to establish all facts essential to the decree.—*Foot v. Bush*, 522.
26. *Same*—Defendants, to sustain the issue that a notice to redeem from tax sale was served August 11, introduced the return of service, and the affidavit of defendant that he had such notice served on said day. The papers were in the handwriting of the defendant, except the signature to the affidavit. They were marked filed in the treasurer's office, as of such date. The dates, and the words, "Filed this eleventh day of August," were in the handwriting of the defendant. Plaintiffs were positive that the papers were not served until the thirteenth. The credibility of the person serving the papers was successfully attacked. *Held*, that a finding that the service was made on August 13, would not be disturbed.—*Waller v. Hintrager*, 148.
27. **EXEMPLARY DAMAGES**—An award by the jury of exemplary damages, in an action for the wrongful suing out of an attachment, will not be disturbed, on appeal, as excessive, except in extreme cases.—*Union Mill Co. v. Prenzler*, 540.
28. **INSTRUCTION**—Alleged error in instructions will not be considered on appeal, where the record does not contain all the instructions, and those given announce correct abstract propositions of law.—*Kreger v. Sylvester*, 647.
29. **RECORD BELOW**—The question of the admissibility of evidence, of slips of paper marked as exhibits, is not raised by an abstract showing that "plaintiff's offer in evidence" said

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conclusion if it had to try the case anew, on the evidence.—
Union Mill Co. v. Prenzler, 540.

- 82. Transcript—CERTIFICATION—Bill of Exceptions—**The evidence will not be stricken from the record, on appeal, on the ground that the official shorthand reporter's transcript of the shorthand notes was not duly authenticated, where an amendment to the abstract shows that a sufficient bill of exceptions was properly filed, and that the translation of the shorthand notes was duly certified within the time allowed by law—*Rassing v. Ordway*, 611.

PREFERENCES—See GEN. ASSIGN. ¹, ⁴.

PRESCRIPTION—See DEDICATION; HIGHWAYS, ⁴.

PRESIDENT AND SECRETARY—See CORPOR., ¹.

PRINCIPAL AND AGENT—See CONTRACT, ⁶; EVID. ¹, ², ²²; INSUR. ¹⁴; MECH. LIEN, ¹; PRACT. ⁴⁶.

While, ordinarily, one who offers to manufacture goods for another at a specified price without specifying the quality, will not be bound to furnish goods of a quality which his unauthorized agent led the other party to expect would be furnished, he is bound to do so, where the agent tells him what has occurred and he is led thereby to make the offer—*Dietrich & Capell v. Stebbins*, 426.

PRIVILEGE—See LIBEL.

PROMISSORY NOTES—See CORPOR. ⁷.

PUBLIC POLICY—See INSUR. ⁴.

PURCHASER—GOOD FAITH—See FRAUD. ¹; NEGOT. INSTR. ¹, ², ³.

RAILROADS—See INSTRUCT. ²; NEGLIGENCE. ², ³.

- 1. Boarding Moving Train—VIOLATION OF STATE LAW—Rules of Railroad—**Under the statutes of Illinois (Hurd's Revised Statutes 1891, chapter 114, section 79), forbidding any person to board a moving train, except in compliance with law, or by permission, under the lawful rules and regulations of the company, a person injured while attempting to board a moving train within the state of Illinois, cannot recover therefor, in Iowa, unless it appears that he was acting in compliance with law, or by permission, under the lawful rules of the company.—*Young v. C. M. & St. P. R'y Co.* 857.
- 2. BURDEN OF PROOF—**Where such attempt was made by permission, or direction, of the conductor of the train, the burden is on the plaintiff to show that the permission, or direction, relied on was in accordance with the rules and regulations of the company.—*Idem*.

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8. COURT AND JURY—One whose injuries are the proximate result of his violation of a statute is, as a matter of law, guilty of contributory negligence precluding recovery for the negligence of another, which contributed to such injuries.—*Idem*.
4. Passengers—EJECTMENT OF—Where a passenger takes a dog with him into a passenger car, contrary to the rules of the railroad company, and refuses to remove him when requested, the conductor is justified in removing both from the car in a proper manner, though the passenger has paid his fare.—*Gregory v. C. & N. W. Ry. Co.* 845.
5. *Recovery of Ticket*—A passenger who is removed from a railway train on account of his refusal to comply with a reasonable regulation of the company, forfeits his rights under his ticket, and cannot recover the value thereof.—*Idem*.
6. *Reasonable Rule—Court and Jury*—The reasonableness of a rule of a railway company prohibiting a passenger from having a dog with him in its passenger coach, and exacting a charge for carrying dogs in the baggage car, is a question of law for the court; and its holding that such rules are reasonable is affirmed.—*Idem*.
7. INSTRUCTIONS—*Harmony*—A petition alleged that the brakeman called plaintiff's station; that the car stopped; and that plaintiff, while attempting to alight, was thrown off, by the sudden starting of the car; and that "defendant was negligent in stopping the car when it did, and in inviting and permitting passengers to leave the train." The first paragraph of an instruction stated the negligence charged, in the language of the petition. Another paragraph told the jury that they might find the defendant negligent if, when plaintiff attempted to alight, the brakeman failed to inform him that the train had not yet reached the station, and plaintiff could not see that the train was not yet at the station, and, while exercising ordinary care, he was thrown off and injured by the starting of the car. *Held*, that the instructions were not contradictory in stating the negligence charged.—*Devine v. C., M. & St. P. R'y Co.* 692.
8. *Recovery of Ticket*—An instruction in an action for personal

RAIL. Continued

9. **Negligence—DUTY OF CREW**—Employees in charge of an engine have the right to assume that a switchman who was attempting to mount on the front foot-board for the purpose of making a switch, has succeeded in doing so, where he is hidden from their view by the boiler; and are not required to stop the engine to ascertain whether he has done so.—*Ferguson v. C., M. & St. P. Railway Co.* 738.
10. **HEARING OUTCRY—Jury Question**—Plaintiff, a switchman on defendant's railroad, fell while attempting to climb upon the foot-board of a slowly moving switch engine, but caught hold of the foot-board by which he was dragged one hundred and sixty-seven feet, and his foot was crushed. During this time, he continually cried out for the engineer to stop. A person on the foot-board near the center, though standing, would be shut off from the view of those on the engine. The bell was ringing, and there were four persons on the engine, all of whom testified that they heard no outcry, but stopped the train at once, on being signaled by a bystander. *Held*, the fact that plaintiff's outcry was heard by persons standing at a distance from the engine, would not justify holding that it was heard by those on the engine, and that there was no evidence of negligence on the part of any of the employes which would render the defendant liable for the injury.—*Idem*.
11. **CONTRIBUTORY NEGLIGENCE**—A switchman who voluntarily steps into the middle of a track in front of an engine which he intends to board, instead of getting on at the side, which he can do with safety, is guilty of such contributory negligence as will prevent a recovery for an injury caused by his slipping and falling in front of the engine.—*Idem*.
12. **General and Special Rule of Railroad**—A general rule of a railroad company authorizing the running of its freight trains at a speed of twenty-five miles per hour, is not admissible in an action by one of its engineers for injuries received at a specified place, alleged by the company to be due to his own negligence in running his train at a greater rate of speed than that prescribed for such place by a special rule of the company, though he ran there at less than twenty-five miles per hour.—*Laird v. C., R. I. & P. R'y Co.* 836.
13. **Special and General Verdict**—A general verdict for plaintiff for injuries caused by failure of a locomotive approaching a highway to give signals at the distance therefrom required by Acts Twentieth General Assembly, chapter 104, section 1,

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whereby plaintiff's horse approached near the railroad, and became frightened, is not overcome by special findings that plaintiff did not look, or listen, for a train before reaching an opening, one hundred and thirty-four feet from the railroad, in a hedge extending along the side of the highway, and that there was a place between such opening and plaintiff's house (the distance not being shown) at which plaintiff could have known of the approach of the train, if she had looked and listened.—Case v. C., M. & St. P. R'y Co. 487.

14. **Killing Stock**—Defendant's section men closed gates opening from D's property on the track, twice. After closing them the second time, they stopped to repair the track, about fifty rods distant. D passed through the gates, and left them open, and plaintiff's cattle, having escaped from his land onto D's land, went through the gates on the track, and were killed. *Held*, that the defendant was not liable on account of the fact that said employes failed to return and see if the gates were closed before leaving for the night, though they might have seen the gates from where they were at work.—Harding v. C., M. & St. P. R'y Co. 677.

15. **Total Disability**—PLEADING—*Damages*—An instruction in an action by a railroad engineer for personal injuries, which fails to specifically instruct the jury, that in arriving at the damages to his earning power, they must consider what he may be able to earn in the future by intellectual as well as manual labor, is erroneous, even though the complaint alleges a loss of earning power by manual labor only. The defendant railroad should not have to pay for the results of total disability of plaintiff, if, though incapacitated for manual labor, he remained able to earn money otherwise.—Laird v. C., R. I. & P. Railway Co. 886.

RAPE—See CRIM. LAW, 44, 45, 46.

RATIFICATION—See MECH. LIEN, 1.

REAL PROPERTY—See LIM. of ACT, 1.

REASONABLE DOUBT—See CRIM. LAW, 20.

REBUTTAL—See CRIM. LAW, 19.

RECEIVERS—See CONTRACT, 14, CORPOR. 2.

RECORDING ACTS—See ACKNOWLEDGMENTS, 2.

REDEMPTION—See TAXAT. 2.

REFEREE.

1. **Loss of Jurisdiction**—A referee has no jurisdiction to act after the time he was required, in the order of appointment, to make his report.—Davis v. Caldwell, 658.

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- | REFEREE Continued | TO | RESCISSION |
|-------------------|--|------------|
| 2. | SAME—An order by the court, after the expiration of the time fixed for filing a referee's report, directing that the per diem of the several reporters "heretofore" and "hereafter" acting for such referee be taxed to the county, is insufficient to validate the referee's report, made after the expiration of such time.— <i>Idem</i> . | |
| 3. | ESTOPPEL—A party assenting to a continuance by the referee beyond the time he was required to make his report, and appearing and taking part in the hearing, without objection, is not estopped to deny the jurisdiction of the referee.— <i>Idem</i> . | |

REFORMATION—See PRACT. ⁴⁰.

REMITTITUR—See PRACT. ⁴¹.

REMONSTRANCE—See HIGHWAYS, ¹.

REPEAL—See CONSTRUCTION, ¹.

REPLEVIN—See EVID. ³¹, ³²; PLEAD. ¹.

REPLY—See PLEAD.; PRACT SUP. CT. ³⁰.

RES ADJUDICATA—See DEMURRER; PLEAD. ¹, and page 748.

RESCISSION—See CONTRACTS, ⁹; LIM. OF ACT. ¹; PRACT. ¹³.

1. **Laches**—A suit to rescind a deed for mistake in the subject-matter is not barred by laches, where the transaction took place in 1887, and plaintiff did not discover that he had received the wrong land until 1890, and, after fruitless negotiation with defendant for settlement, brought action in April, 1891, for fraud, and did not discover the mistake until defendant filed his answer, in October, 1891, and amended the complaint in the following November, so as to seek a rescission for the mistake.—*Clapp v. Greenlee*, 586.
2. **Offer and Tender**—It is no defense to a *bill to rescind a deed for mistake*, as to the subject-matter, that plaintiff allowed the land to go to tax sale and had mortgaged it, where the complainant tendered a re-conveyance free from incumbrance.—*Idem*.
3. **Want of Damage**—It is no defense to a *bill to rescind a deed for mistake* as to the subject-matter, that the tract actually conveyed is worth as much as the one plaintiff contracted to buy.—*Idem*.

RETURN—See EVID. ³³.

RIPARIAN RIGHTS—See PIERS.

ROAD DISTRICTS—See HIGHWAYS, ¹; PRACT. ¹¹, ⁴⁸.

ROBBERY—See CRIM. LAW, ⁴⁷.

RULES—See RAIL. ¹, ², ⁴, ⁶, ¹².

SALES—See HIGHWAYS, ¹.

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SCHOOLS

SCHOOLS—See **CONTRACTS**, ¹², ¹⁴; **PRACT.** ¹⁰, ²⁰; **TAX.** ⁵.

1. **Contract with Teacher—APPROVAL BY PRESIDENT—*Estoppel***
—Code, section 1758, provides that a sub-director of a school board, under the rules of the board, may contract for employment of a teacher, and that the contract shall be approved by the president and reported to the board. *Held*, that where a contract was made with a teacher, and signed by a director, who was, in fact, at the time, president of the board of directors, and filed with the secretary, his failure to approve the contract as president, and file it with the board of directors, did not render the contract invalid.—*Benson v. Township of Silver Lake*, 328.
2. **SAME—*Subsequent Change of Authority to Employ***—A school board authorized its president to employ plaintiff as teacher for the "winter term." No provision was made as to what number of weeks constituted such term. The president employed plaintiff for the term of nine months. *Held*, that a subsequent action of the board, whereby it attempted to correct the record, by stating that the board of directors employed teachers for six months only, and that the president was authorized to close contracts for "six months only—the winter term," did not affect the contract entered into with plaintiff; assuming, even, that the teacher would be bound by resolutions of the board, of which she had no actual knowledge.—*Idem*.
3. **DISCHARGE OF TEACHER—*Hearing***—Under Code, section 1734, a school teacher cannot be discharged before the expiration of her term, without an opportunity to be heard.—*Idem*.
4. **Courts and County Superintendent**—McClain's Code, section 2985, declaring that any person aggrieved by any decision of the district board of school directors may appeal to the county superintendent, does not prejudice the right to an appeal to the courts, upon questions involving the authority of the board of directors.—*Rodgers v. School District of Colfax*, 317.
5. **Selection of School Site—*Revocation***—A school board selected an old site whereupon to erect a new schoolhouse, which was in contemplation, and ordered an election on the question of issuing bonds to build. The resolution ordering the election used the words "if practicable," with reference to placing the building on the old site. The notice of election recited that it was proposed to issue bonds to build on the old site and the ballots used, so indicated. *Held*, after these bonds were voted, the board could not use the bonds voted to build on

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a new site, especially where it does not appear that the old site was impracticable.—*Idem*.

6. **Taxation—*Estoppel***—The fact that one of the directors of a school district, and the secretary of the school district board, and an elector who was not an officer of the district, while acting as judges of a school district election, refused to allow electors residing on certain land to vote, on the ground that they lived outside of the district, will not estop the district from thereafter claiming that such land was within its limits, for purposes of taxation.—Independent District Ottumwa v. Taylor, 617.

SELF DEFENSE—See CRIM. LAW, ⁶⁰, ⁶².

SERVICE OF NOTICE—See INSUR. ⁴; ORIG. NOTICE.

SETTING FIRE—DAMAGES, ⁶, ⁷; NEGLIGENCE, ⁴, ⁶.

SHERIFFS—See ATTACH. ²; EVID. ²³; EXECUTION SALE; NEW TRIAL, ², ⁴.

SHORTHAND REPORT—See CRIM. LAW, ¹¹; PRACT. SUP. CT. ²⁸.

SIDEWALKS—See NEGLIGENCE. ¹².

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SPECIAL FINDINGS—See NEGLIGENCE. ¹².

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SPECIFIC PERFORMANCE—See CONTRACTS, ¹⁰, ¹¹.

STATUTES—CONSTRUCTION—See CONSTR. OF STAT.

STATUTE OF FRAUDS—See CONTRACTS, ¹; EVID. ²⁶, ²⁷.

STATUTE OF LIMITATION—See LIM. OF ACT.

STOCKHOLDER—See CORPOR. ⁴, ⁶.

SUPERIOR COURT—See CERTIORARI.

SURVIVAL OF ACTIONS—See ESTATES, ⁵.

TAXATION—See DRAINS, ¹, ²; PRACT. ¹⁰, ²²; SCHOOLS, ⁶.

1. **Deed—*Presumptions***—Under Code, section 897, providing that a tax deed is presumptive evidence that the land was subject to taxation, and had been listed and assessed, the fact that the county records do not show that the land was not assessed for the year 1870, will not overcome the presumption of validity of the sale for taxes for such year, where a large part of the county records, including the assessor's books, were destroyed by fire in the year 1877.—Barrett v. Kevane, 658.
2. **Equitable Redemption—NEGLIGENCE OF REDEMPTIONER**—An owner of land, who, though offering to pay the taxes thereon, which were refused by the treasurer, through mistake, on the ground that they had been previously paid, knew of the sale of the land for non-payment of such taxes before the expiration of the time for redemption, and failed to redeem, is guilty of negligence which will defeat his recovery, in an action in

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- equity, brought thereafter, to be allowed to redeem.—*Easton v. Doolittle*, 874.
8. **Government Lands—Construction of Statutes**—Under Revision 1860, section 711, sub-division 7, providing that government lands entered shall not be taxed for the year in which the entry, location, or purchase was made; and section 712, making all real estate not exempt by the preceding section, subject to taxation, — lands entered in 1869, were not exempt from taxation for the year 1870, no matter when the patent issued.—*Barrett v. Kevane*, 653.
4. **Lien—TAXES ON PERSONAL PROPERTY—Lien on Realty—Mortgage**—Code, section 865, providing that taxes assessed on personalty shall be a lien on the land of the persons assessed, does not make such lien prior to the lien of a previous mortgage on land, executed by the owner.—*Bibbins v. Polk County*, 493.
5. **Schools—Title to Taxes**—A school district which has for thirty years furnished school privileges free of charge to people, living on designated land, and assessed and collected taxes during such time against such land, is entitled to the money paid for such taxes where no other district has ever claimed any of the tax, or that the land was within its jurisdiction, although, through loss of records, there is no record of the organization of such district, or how such land came to be treated as a part thereof.—*Independent District Ottumwa v. Taylor*, 617.
6. **Voluntary Payment—Construction of Statute**—The payment by a second mortgagee of land, of a lien for taxes, inferior to such mortgage, to induce the prior mortgagee to dismiss an action to foreclose his mortgage, is not within Code, section 870; providing for the refunding to the taxpayer of any tax, or portion thereof, found to have been "erroneously or illegally exacted or paid."—*Bibbins v. Polk County*, 493.

TRANSCRIPTS—See PRACT. SUP. CT. ²².

TRANSFER TO EQUITY—See PRACT. ²².

TEACHERS—See SCHOOLS; CONTRACTS, ¹², ¹⁴.

USURY

TO

WILLS

USURY.

1. **Change of Statute**—In an action on a note made before the passage of Acts, 1890, reducing the legal rate of interest, an instruction which permitted the inference that the note would draw only the reduced rate, after the passage of the act, was erroneous—*Kassing v. Ordway*, 611.
2. **Jury Question**—Where a person buys a machine, and sells it to another at an advanced price, and takes his note for it, it is a question for the jury whether the transaction was a device to cover usury.—*Idem*.
3. **Purging**—The parties to a usurious note indorsed upon it that a stated sum had been paid for all usurious interest in that and another note. It was testified that this was done to purge usury. *Held*, it was error not to charge that usury might thus be purged.—*Idem*.

VACATION OF JUDGMENTS—See DAM. 2; JUDG. 2, 4, 5.

VACATION—ORDER IN—See CRIM. LAW, 1.

VENUE—See CRIM. LAW, 6; PRACT. 46, 47.

VERDICT—See PRACT. 17, 23, 46.

WAIVER—See CONTRACTS, 16; CRIM. LAW, 32; INSUR. 14; PLEAD. 7; PRACT. 14, 27.

WARRANTY—See CONTRACTS, 16; INSUR. 16; PLEAD. 5.

WILLS—See EVID. 27.

1. **Advancements—Construction**—A provision in a will that "the actual cash value" of lands given to the testator's sons by way of advancement, shall be considered its value, if no sum is named, does not apply to an advancement to a son by a deed reciting a consideration of one dollar and love and affection, where the son gave back a receipt contemporaneously therewith, stating that the property is estimated as of a specified value, with which amount he is to be charged upon his share of the estate.—*Ballinger v. Connable*, 600.
2. **SAME**—A father, after devising to his three sons equally, the residue of his estate, provided that, for purposes of distribution, the principal of all advancements, without interest, should be considered as part of the residue of the estate, in their hands, respectively, and that, in case of conveyances, the consideration named therein, or if no consideration was named, the actual cash value at the time of distribution, should be treated as the amount of the advancement. The father, several years prior to his death, purchased for one of his sons a farm, and put him in possession, but retained title thereto in himself. This farm was allotted to the son in

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possession, by the executors. *Held*, that the actual cash value of the farm at the time of distribution should include the value of the improvements made thereon by the son while in possession, by his own labor and by the expenditure of money charged against him in the settlement as advancements; and that such advancements, made by the conveyance of land, should be diminished, on distribution, by deducting said improvements; it not appearing that the father intended the value of the improvements to be credits against the advancements.—*Idem*.

8. Construction of—A will, after devising the testator's entire estate in trust to his executor, to be invested so as to produce an income, provided that the income should be paid to his wife so long as she remained a widow; that, if she re-married, one-half of his estate should be paid to her, and the other half to his sister, or if his sister was then dead, divided equally among his heirs at law by blood kinship. *Held*, that the sister, on the death of the wife without having re-married, was entitled to take only as an heir.—*Opel v. Shoup*, 407.

WITNESS—See CRIM. LAW, 19; EVID. 2, 4, 29, 30.

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